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SHDKT PROCEEDINGS AND ORDERS DATE: [07/06/94]

CASE NBR: [93101159] CSX STATUS: [DECIDED]
SHORT TITLE: [Winfield, Linda, et al.]
VERSUS [Kaplan, Richard, et al.] DATE DOCKETED: [011894]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jan 18 1994	D	Petition for writ of certiorari filed.
3	Feb 22 1994	X	Brief of respondents Richard Kaplan, et al. in opposition filed.
2	Feb 23 1994		DISTRIBUTED. March 18, 1994 (Page 2)
4	Mar 14 1994	X	Reply brief of petitioners Linda Winfield, et al. filed.
5	Jun 20 1994		REDISTRIBUTED. June 24, 1994 (Page 20)
7	Jun 27 1994		REDISTRIBUTED. June 30, 1994 (Page 1)
8	Jun 30 1994		Petition DENIED. Dissenting opinion by Justice Scalia with whom Justice Kennedy and Justice Thomas join. (Detached opinion.)

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No. —— 93-T-59 JAN 18 199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LINDA WINFIELD, WILLIAM H. WINFIELD, JR., and LINDA WINFIELD d/b/a the PROLIFE ACTION LEAGUE OF GREENSBORO,

Petitioners,

v.

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Respondents.

Petition for Writ of Certiorari to the North Carolina Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state trial court in Greensboro, North Carolina granted a preliminary injunction forbidding all "picketing, parading, marching, or demonstrating" along an entire residential street, plus 300 feet in any direction from that street. The state court of appeals affirmed, and the state supreme court denied review.

1. Is an injunction restricting "picketing, parading, marching, or demonstrating" in a traditional public forum a "prior restraint"?

2. Is an injunction that restricts only pro-life demonstrators "content-neutral"?

3. Is an injunction banning all "picketing, parading, marching, or demonstrating" on an entire residential street and for 300 feet beyond that street a violation of the federal constitutional right to free speech?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case. None of these parties is a corporation. *See* Rule 29.1.

Ronald W. Benfield was a *pro se* defendant in the trial court. He did not appeal or participate in the proceedings on appeal.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the North Carolina court of appeals is reported as *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 431 S.E.2d 828 (1993) (App. 1a). The decision of the Supreme Court of North Carolina denying review is reported as *Kaplan v. Prolife Action League of Greensboro*, 335 N.C. 175, 436 S.E.2d 379 (1993) (App. 57a). The written decision of the Superior Court of Guilford County, North Carolina, granting a preliminary injunction, is unreported. *Kaplan v. Prolife Action League of Greensboro*, No. 92 CvS 3228 (N.C. Super. Ct. Feb. 20, 1992) (App. 44a).

JURISDICTION

The Court of Appeals of North Carolina entered its decision on July 20, 1993. The order of the Supreme Court of North Carolina denying review was entered on October 18, 1993. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Facts

Linda and William Winfield, petitioners in this Court and defendants-appellants below, are opponents of abortion. The Kaplans, respondents in this Court and plaintiffs-appellees below, are an abortionist, his wife, and their two teenage sons.

Twice each week the Winfields engage in picketing and sidewalk counseling (offering information and alternatives to abortion) at the Women's Pavilion, an abortion facility in Greensboro, North Carolina. Beginning in November of 1990 and continuing through 1992, the Winfields also participated in "special witnesses" on roughly a monthly basis. "Special witnesses" consist of picketing, leafletting, or marching, and take place at the regular medical offices or in the residential neighborhoods of doctors or nurses who practice abortion.

Participants in residential marching vary in age from very young children to elderly citizens up to age 82. The number of participants ranges from a dozen to two dozen at a time. Individuals walk in virtual silence, carrying signs with anti-abortion messages or pictures. Some signs name the abortionist or nurse in whose neighborhood the march is taking place.

The first "special witness" was a picket at the house of Dr. Robert Wein on Nov. 13, 1990. Police arrived but made no arrests or charges. Six days later the city council of Greensboro passed an ordinance banning picketing "solely in front of, before or about the residence or dwelling of any individual." Greensboro, N.C., Code of Ordinances, § 26-157(b). Law enforcement officials in Greensboro interpret this ordinance to forbid only picketing in front of a single house, not walking in front of a range of houses. To comply with the new ordinance, the Winfields and their companions thereafter either distributed leaflets door-to-door or walked along a route extending at least a block or two and encompassing a dozen or so houses.

Since January of 1991, the Winfields have always given advance notice to the police of their planned residential "witnesses." Police escorts have been present at every residential "witness" since January of 1991. Police have not arrested or cited any of the participants.

The reactions of neighbors and passersby to the "witnessing" have ranged from resentment and distress, to indifference, to curiosity, to welcome.

Over the 14-month period from the first picket at Dr. Wein's house in November of 1990 to the last march in Dr. Kaplan's neighborhood in January of 1992, the Winfields took part in residential "witnesses" (marches, pickets, leafletting) in the neighborhoods of six different doctors or nurses involved in the practice of abortion in Greensboro. The most frequent site of the residential "witnesses" was the Kaplan neighborhood. As Linda Winfield explained, "we normally witness only in the neighborhoods of doctors who come to do abortions at Women's Pavillion," and in much of 1991, "Dr. Kaplan [was] the only physician we [saw] at Women's Pavilion . . . ." L. Winfield Aff. ¶ 17. Doctors Robert Wein and Mark Anderson and nurse Kay Inman ceased their abortion work at Women's Pavilion after pickets or marches in their neighborhoods.

The Winfields walked through the Kaplan's neighborhood on a "special witness" march on Jan. 15, April 17, June 14 & 21, Aug. 9 & 23, Sept. 20, Oct. 25, Nov. 18, 19 & 20, in 1991, and on Jan. 11, 1992. On Nov. 21, 1991, the Winfields picketed at the entrance to the Kaplans' neighborhood.

The Winfields desire to continue "witnessing" periodically in the neighborhoods of abortionists, including Dr. Kaplan. William Winfield has told Dr. Kaplan that the Winfields would cease their "witnessing" in the Kaplan's neighborhood as soon as Dr. Kaplan stops "killing the babies."

The Kaplans allege that the residential "witnesses" have frightened and intimidated them, have decreased their use and enjoyment of their home, and constitute harassment. However, the Kaplans have not alleged or shown that the "witnesses" involved any trespass, destruction of

property, physical abuse, excessive noise, or disorderly conduct,

The Prolife Action League (PAL) of Greensboro is the title or banner under which Linda Winfield puts out a pro-life newsletter and other pro-life literature.

Proceedings

Respondents Richard D. Kaplan, his wife, and their two teenage sons filed suit in the Superior Court of Guilford County on January 14, 1992. Respondents alleged causes of action based on private nuisance, intentional infliction of emotional distress, and other theories, and requested injunctive relief, damages, and attorney fees.

On Jan. 14, 1992—the day respondents filed suit—the superior court granted an *ex parte* temporary restraining order prohibiting "picketing, parading, marching, or demonstrating at or around the Kaplans' home in any manner tending to draw attention to the Kaplans or their home," App. 51a. On Feb. 10, 1992, the superior court held a hearing on respondents' motion for a preliminary injunction. Petitioners objected, *inter alia*, on the basis that the proposed injunction would violate their First Amendment right to free speech. The court orally issued a preliminary injunction on Feb. 10, 1992, and subsequently entered a written order, with findings and conclusions, on Feb. 20, 1992. The injunction forbade petitioners from "picketing, parading, marching, or demonstrating anywhere on Waycross Drive in Greensboro, North Carolina," and "anywhere within 300 feet of the center line of Waycross Drive, including any parts of any other street that fall within 300 feet of the center line of Waycross Drive," App. 47a. (The Kaplans live on Waycross Drive. App. 49a). The court held that respondents were likely to prevail on their claims of private nuisance and intentional infliction of emotional distress, and that the preliminary injunction was a reasonable time, place, and manner regulation of free speech. App. 46a.

Petitioners Linda Winfield, William H. Winfield, Jr., and the Prolife Action League of Greensboro appealed, renewing on appeal their challenge to the constitutionality of the injunction under the First Amendment.

On July 20, 1993, the Court of Appeals of North Carolina affirmed. *Kaplan v. Prolife Action League of Greensboro,* 111 N.C. App. 1, 431 S.E.2d 828 (1993) (App. 1a).

The appeals court held that the lower court had erred in finding respondents likely to prevail on the merits of their claim of intentional infliction of emotional distress, 431 S.E.2d at 836-38 (App. 14a-19a), but otherwise affirmed the judgment of the superior court. The appeals court ruled that respondents were likely to prevail on their claim of private nuisance. *Id.* at 838-41 (App. 19a-25a). The court identified no basis—other than the peaceful residential marching itself—for holding petitioners' marching to be a nuisance; nevertheless, the court held that "the trial court did not err in its balancing of the utility of [petitioners'] conduct against the gravity of the harm to [respondents]." *Id.* at 839 (App. 22a).

The court of appeals held that petitioners had engaged in "targeted residential picketing," not because of any stationary physical gathering in front of the Kaplan home —there was none—but because the *message* and *goal* of the marches were directed at inducing Dr. Kaplan to stop his abortion practice. *Id.* at 841 (App. 26a).

Finally, the court of appeals rejected petitioners' First Amendment arguments. While acknowledging that the lower court had restricted expressive activity in traditional public fora by means of an injunction, *id.* at 832, 834, 842 (App. 7a, 11a, 28a), the court refused to analyze the injunction as a prior restraint, *id.* at 844 (App. 32a-33a). Instead, the court reviewed the injunction under the time, place, and manner standard for statutes, ordinances, and regulations. *Id.* at 842 (App. 28a-29a). The court concluded that the injunction was content-neutral,

id. at 842-43 (App. 29a-31a), was narrowly tailored to serve the significant government interest in residential privacy, *id.* at 843-47 (App. 31a-39a), and allowed for ample alternative channels of communication, *id.* at 847 (App. 39a). Accordingly, the court affirmed the injunction in all respects.

Petitioners filed an appeal and a petition for discretionary review with the Supreme Court of North Carolina. That court dismissed the appeal for want of a substantial constitutional question and denied discretionary review. *Kaplan v. Prolife Action League of Greensboro,* 335 N.C. 175, 436 S.E.2d 379 (1993) (App. 57a).

REASONS FOR GRANTING THE WRIT

The preliminary injunction which the court below upheld bans all "picketing, parading, marching, or demonstrating" along an entire street plus 300 feet in any direction from that street. This injunction represents the most extreme injunctive restriction, on peaceful public expression in residential neighborhoods, upheld by any court to date.[1]

---

[1] Attempts to restrict protest activity in residential neighborhoods have produced considerable litigation, much of which is ongoing.

Cases involving injunction suits against residential demonstrators include the following: *Northeast Women's Center, Inc. v. McMonagle,* 745 F. Supp. 1082 (E.D. Pa.), *modified,* 749 F. Supp. 695 (E.D. Pa. 1990), *aff'd in part, modified in part, and remanded,* 939 F.2d 57 (3d Cir. 1991) (overturning 2500-foot ban and replacing it with 500-foot ban); *Valenzuela v. Aquino,* 763 S.W.2d 43 (Tex. Ct. App. 1988) (overturning one-half mile ban), *subsequent appeal,* 800 S.W.2d 301 (Tex. Ct. App. 1990), *aff'd in part, rev'd in part, and remanded,* 853 S.W.2d 512 (Tex. 1993) (overturning 400-foot ban); *Klebanoff v. McMonagle,* 380 Pa. Super. 545, 552 A.2d 677 (1988) (upholding ban on picketing on street in front of abortionist's residence), *alloc. denied,* 563 A.2d 888 (Pa. 1989); *Boffard v. Barnes,* 264 N.J. Super. 11, 624 A.2d 1 (App. Div.) (upholding ban on picketing in "immediate vicinity"), *certif. granted,* 627 A.2d 1150 (N.J. 1993); *Murray v. Lawson,* 264 N.J. Super. 17, 624 A.2d 3 (App. Div.) (upholding 300-foot ban), *certif. granted,* 627 A.2d 1149 (N.J. 1993); *Dayton Women's Health*

The decision below, upholding this injunction, conflicts either directly or implicitly with the decisions of every state and federal court to consider restrictions on residential picketing, including the supreme courts of Texas, Kansas and Rhode Island, state appellate courts in Minnesota and Ohio, the U.S. Court of Appeals for the Third Circuit, and a federal district court in Ohio. The decision below also squarely conflicts, in several important respects, with the applicable decisions of this Court.

This Court should grant review.

Center v. Enix, 68 Ohio App. 3d 579, 589 N.E.2d 121 (1991) (upholding ban on picketing within "viewing distance" of homes of abortion staff), *review denied*, 62 Ohio St. 3d 1500, 583 N.E.2d 971, *cert. denied*, 112 S. Ct. 3033 (1992); *Ramsey v. Edgepark, Inc.*, 66 Ohio App. 3d 99, 583 N.E.2d 443 (overturning 200-yard ban), *review dismissed*, 53 Ohio St. 3d 712, 560 N.E.2d 780 (1990); *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993) (per curiam) (upholding 300-foot ban), *petitions for cert. filed*, No. 93-833 (U.S. Nov. 24, 1993), No. 93-880 (U.S. Dec. 3, 1993); *Women's Health Center of Duluth v. Operation Rescue*, No. CO-93-601157 (Minn. Dist. Ct. July 28, 1993) (granting two-block ban), *appeal pending*, No. C9-93-1776 (Minn. Ct. App. appeal docketed Sept. 2, 1993).

Cases involving ordinances restricting residential demonstrations include the following: *Town of Barrington v. Blake*, 568 A.2d 1015 (R.I. 1990) (upholding ordinance banning single-residence picketing); *State v. Castellano*, 506 N.W.2d 641 (Minn. Ct. App. 1993) (upholding conviction for single-residence picketing); *Vittitow v. Upper Arlington*, 830 F. Supp. 1077 (S.D. Ohio 1993) (preliminarily enjoining ordinance to allow picketing except immediately in front of residence or house on either side), *appeals pending*, Nos. 93-4034 & 4086 (6th Cir. docketed Sept. 25 & Oct. 6, 1993); *Kirkby v. Lindgren*, No. A3-93-93 (D.N.D. plaintiffs' summary judgment motion filed Dec. 22, 1993) (challenge to block-length bans). *See also Jews, KKK Protest in Seven Hills*, The Plain Dealer (Cleveland), Dec. 20, 1993, at 1B (litigation over protests at home of John Demjanjuk).

I. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

The decision of the North Carolina Court of Appeals, affirming an injunctive ban on all "picketing, parading, marching, or demonstrating" along an entire residential street as well as anywhere within 300 feet of that street, conflicts in at least three ways with decisions of other state and federal courts.

A. Availability of Injunctive Relief Against Peaceful Picketing

First, the decision below treats residential demonstrations as *per se* unlawful and enjoinable. This ruling conflicts directly with a decision of the Supreme Court of Texas.

In *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993), the Supreme Court of Texas held that residential picketing is not intrinsically unlawful. While courts may remedy specific misconduct and municipalities may regulate residential picketing, a court may not forbid such peaceful expression *per se*. *Id.* at 513-14.

This rule is no more than the logical consequence of this Court's repeated holding that residential picketing and marching represent core First Amendment activity. *E.g.*, *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

Yet the court below upheld a blanket injunction against *all* "picketing, parading, marching, or demonstrating" in a zone stretching over several residential blocks. This injunctive ban applies regardless of the circumstances of the expressive activity, such as the number, orderliness, or quiet of the participants, the length of the route, and the frequency or duration of the demonstrations.

B. Scope of Permissible Restrictions on Residential Demonstrations

The decision below, upholding an injunction of very broad geographical scope, conflicts with the decisions of every state and federal court that has considered the limits of constitutionally permissible restrictions on expressive activities in residential areas.

In *Frisby*, this Court recognized the government interest in protecting a resident from a lingering physical presence which renders the occupants a "captive" audience who is "trapped within the home." 487 U.S. at 487. The Court carefully distinguished "picketing taking place solely in front of a particular residence," *id.* at 484, from walking "in front of an entire block of houses," *id.* at 483, or other "more generally directed means of communication," such as handbilling, solicitation, or marching, *id.* at 486. The latter activities, the Court held, "may not be completely banned in residential areas." *Id.*

Courts facing challenges to residential picketing ordinances since the *Frisby* decision have consistently interpreted those ordinances narrowly in order to observe the important distinction between a focused, continuing presence outside the home, on the one hand, and more transient or intermittent forms of public expression, on the other. *E.g., Town of Barrington v. Blake*, 568 A.2d 1015 (R.I. 1990); *State v. Castellano*, 506 N.W.2d 641 (Minn. Ct. App. 1993); *City of Prairie Village v. Hogan*, 253 Kan. 423, 855 P.2d 949 (1993).[2]

---

[2] Scholarly commentators likewise agree that the *Frisby* decision permits only a ban on picketers who gather immediately in front of a single residence. *See* Note, *Residential Picketing: Balancing Freedom of Expression and the Right to Privacy*, 54 Mo. L. Rev. 209, 219 (1989); Casenote, *Frisby v. Schultz: Where Do the Picketers Go Now? "We'll Just Have to Wait and See."* 11 Geo. Mason L. Rev. 227, 242 (1989) ("protestors could march up and down in [the abortionist's] neighborhood . . ., but they could not stand in front of the house"); Note, *Constitutional Law—Freedom of Speech—Ban on Picketing in Front of Individual Residence Does Not Violate First Amendment, Frisby v. Schultz, 108 S. Ct. 2495 (1988)*, 11 U. Ark. Little Rock L.J. 691, 711 (1988-89).

Accordingly, state and federal courts have consistently overturned excessively broad restrictions on residential picketing. *E.g., Ramsey v. Edgepark, Inc.*, 66 Ohio App. 3d 99, 111, 583 N.E.2d 443, 452 (overturning 200-yard injunctive ban; defendants "have a right to picket in the neighborhood, block or street where [plaintiffs] live"), *review dismissed*, 53 Ohio St. 3d 712, 560 N.E.2d 780 (1990); *Valenzuela v. Aquino*, 763 S.W.2d 43, 45 (Tex. Ct. App. 1988) (overturning one-half mile injunctive ban as "clearly" overbroad); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 66-68 (3d Cir. 1991) (holding that 2500-foot injunctive ban is overbroad; reducing zone to 500-foot radius); *Vittitow v. City of Upper Arlington*, 830 F. Supp. 1077, 1082 (S.D. Ohio 1993) (preliminarily enjoining ordinance to allow challengers "to picket in the doctor's neighborhood and even on the cul-de-sac" where he lives; permitting restriction only on picketing immediately in front of doctor's house or in front of the house on either side).

As shown by the Guilford County tax map (App. 59a),[3] the "speech-free zone" in this case extends some 2000 feet (the length of Waycross Drive) by 600 feet (300 feet on either side of Waycross Drive). Even if the Kaplan residence were exactly in the center of this zone—which it is not[4]—the injunctive restrictions would still reach out at least 1000 feet along Waycross plus 300 feet in all directions from that street. Hence the present injunction exceeds the limits of any injunction or ordinance upheld by any court to date.[5]

---

[3] The parties jointly provided this map to the court of appeals in response to an order of that court requiring a tax or plat map of the area.

[4] The Kaplans reside at 500 Waycross Drive, App. 49a, which is lot number 10 on the county tax map, *see* App. 59a.

[5] *See also supra* note 1.

C. Content Neutrality

The court below held that the injunction was content-neutral. This holding squarely conflicts with a decision of the Eleventh Circuit.

In *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), the Eleventh Circuit held that an injunction which restricted pro-life demonstrators—but no others—was viewpoint-based. As the Eleventh Circuit explained:

> That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted. The order enjoins
>
> > Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf. . . .
>
> Such a restriction is no more viewpoint-neutral than one restricting speech of "the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not.

Id. at 710-11 (footnotes omitted). The Eleventh Circuit held that a would-be demonstrator was likely to prevail on the merits of her constitutional challenge to the injunctive restrictions. *Id.*

The present injunction likewise restricts pro-life demonstrators and no one else.[6] The order places no restrictions

[6] The injunction also restricts one Ronald Benfield, who never took part in any pro-life demonstration. Benfield failed to appear and contest the injunction. App. 45a.

on those wishing to engage in an open housing march, an anti-war protest, or even a pro-abortion parade. Yet the court below held that the restriction was content-neutral.

II. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT.

The decision below flies squarely in the face of the governing precedents of this Court.

A. Doctrine of Prior Restraints

The North Carolina Court of Appeals held that a preliminary injunction restricting classic expressive activity in a traditional public forum was not a prior restraint. This holding directly contradicts the decisions of this Court.

"Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). "Prior restraints," unlike general criminal statues, "forbid [a person] from engaging in any expressive activities in the future," *id.* (emphasis omitted). This "time-honored distinction between barring speech in the future and penalizing past speech . . . is critical to our First Amendment jurisprudence." *Id.* at 2773.

Thus, while statutes, ordinances, and regulations restricting speech trigger the traditional "time, place and manner" analysis, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (regulations), injunctions trigger the much stricter doctrine of prior restraints, *e.g.*, *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches, distribution of pamphlets,

and display of materials); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings).

This Court has consistently "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments," *Alexander*, 113 S. Ct. at 2773 (citation omitted). Prior restraints are presumptively unconstitutional. *Carroll*, 393 U.S. at 181; *Keefe*, 402 U.S. at 419. In the context of protected expressive activities, such as picketing, leafletting, and pure verbal communication, a court may "restrain *only unlawful conduct* and persons responsible for conduct of that character." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (emphasis added). In short:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84.

It follows that injunctive provisions which—like the injunction at issue here—restrict peaceful, public expression in traditional public forum property trigger—and violate—the doctrine of prior restraints.

The court below refused to apply the doctrine of prior restraints, despite the fact that the order before it imposed blanket injunctive restrictions on "picketing, parading, marching, [and] demonstrating." This decision patently conflicts with the teachings of this Court.

B. Speech-Free Residential Zone

The court below upheld the creation of a "speech-free zone" which extends some 2000 feet by 600 feet and swallows up traditional public forum streets. This decision plainly contradicts the precedents of this Court.

This Court has long recognized constitutional protection for a variety of methods of expression in residential settings. *See, e.g., Gregory v. City of Chicago*, 394 U.S. 111 (1969) (marching around residential block); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (door-to-door solicitation); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious advocacy door-to-door and on residential ways). While a municipality may forbid "focused picketing taking place solely in front of a particular residence," *Frisby v. Schultz*, 487 U.S. 474, 483 (1988), more sweeping bans are unconstitutional, *id.* at 486.

The present injunction exceeds *Frisby*—and thus runs counter to this Court's established precedents—in at least two respects. First, by pushing demonstrators anywhere from 300 feet to over 1000 feet away from a given residence, the injunction goes far beyond a *Frisby*-type ban on single-residence picketing. Second, by creating an absolute "no demonstrating" zone, the injunction bans not only the *lingering* presence at issue in *Frisby* but also the *transient* presence characteristic of marching, parading, and door-to-door canvassing. *Frisby* permitted municipalities to extend picketers' routes, not to create impenetrable speech-free zones.

C. Content-Discrimination

The court below upheld the injunction at issue as a content-neutral regulation of speech. This decision conflicts with the precedents of this Court regarding content-neutrality.

First, a restriction which singles out only those bearing a particular message—here, the pro-life point of view—

obviously is not content-neutral. *Carey v. Brown*, 447 U.S. 455 (1980); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993). *See supra* § I(C).

Second, this Court has held that a restriction is content-based when the *justifications* offered relate to the *impact of the expression on its audience. Boos v. Barry*, 485 U.S. 312, 320-21 (1988) (plurality); *id.* at 334 (concurrence).

In *Boos*, the Court reviewed a law forbidding, within 500 feet of an embassy, the display of signs that "bring into public odium" foreign governments. 485 U.S. at 316. This Court held that the restriction was content-based:

> [C]ontent-neutral speech restrictions [are] those that are *justified* without reference to the content of the regulated speech. . . .
>
> . . . .
>
> *Regulations that focus on the direct impact of speech on its audience present a different situation.* Listeners' reactions to speech are not . . . "secondary effects". . . .
>
> Applying these principles to the case at hand leads readily to the conclusion that the display clause is content-based. The clause is justified only by reference to the content of speech. Respondents and the United States *do not point to the "secondary effects" of picket signs* in front of embassies. *They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security* of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by *shielding them from speech that is critical* of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.

Id. at 320-21 (plurality) (emphasis altered; internal quotation marks and citation omitted); *see also id.* at 334 (concurrence) (agreeing that regulation of speech cannot be based upon audience reaction and that law in *Boos* is content-based); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (restriction based on "emotive impact of speech" is content-based); *cf. Thomason v. Jernigan*, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991) (city action "clearly aimed at" pro-life demonstrations and justified by reference to such protests is not content-neutral).

In the present case, the superior court enjoined residential "picketing, parading, marching, or demonstrating" precisely because of the impact of the petitioners' *message of protest* upon the respondents. The superior court referred to the *purpose* of the marching, the *naming* of Dr. Kaplan on signs, and the *visibility* of the marchers, as objectionable aspects of the activity. App. 45a. The court of appeals embraced at the same reasoning. 431 S.E.2d at 841 (App. 26a).

Unlike *Frisby*, this case does not involve a *generally applicable* legal ban on *physical congregation* in front of a specific residence. Instead, the court below has banished only *certain individuals* from an entire street because their common *message* is allegedly causing a private nuisance. This is an unconstitutional content-based restriction.

CONCLUSION

The decision of the North Carolina Court of Appeals upheld a restriction on residential demonstrations that is more extreme than any other court, state or federal, has permitted. The decision below conflicts with decisions of other state and federal appellate courts and is impossible to reconcile with the decisions of this Court.

Free speech is not the exclusive prerogative of those embracing fashionable points of view. This Court should grant the present petition.

Respectfully submitted,

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January 18, 1994

APPENDICES

APPENDIX A

NORTH CAROLINA COURT OF APPEALS

No. 9218SC459
Filed: 20 July 1993

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Plaintiffs,

v.

PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, JOHN DOES I through XXV, and JANE DOES I through XXV,

Defendants.

Guilford County
No. 92 CvS 3228

Appeal by defendants from order signed 20 February 1992 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 14 April 1993.

On 20 February 1992, the trial court granted plaintiffs' motion for a preliminary injunction by entering the following order:

> The Court has heard the plaintiffs' motion for a preliminary injunction under N.C. Gen. Stat.

§ 1-485(1)-(2). In connection with this motion, it has reviewed the plaintiffs' verified complaint, the affidavits of Mark Anderson, M.D., Nancy Cable-Wells, Maurice A. Cawn, Susan Gillet, R.N., Kay Lynne Inman, R.N., Joan Marsh, Sue P. Meschan, Joan Osborne, R.W. Saul, Jesse L. Warren, Linda B. Winfield, and William H. Winfield, Jr., and the briefs presented by the plaintiffs and by defendants Linda B. Winfield, William H. Winfield, Jr., and the Prolife Action League of Greensboro. The Court has heard this motion after giving notice to all parties, and has given all parties an opportunity to present arguments. Defendant Ronald W. Benfield failed to appear for the hearing on this motion, despite being properly served with the verified complaint and an order giving notice of the hearing. After considering the evidence, briefs, and arguments presented by the parties, the Court hereby grants the plaintiffs' motion for a preliminary injunction.

Pursuant to [G.S. 1A-1,] Rule 65(d) of the North Carolina Rules of Civil Procedure, the Court makes the following findings:

1. Dr. Richard Kaplan, one of the plaintiffs, is an obstetrician and gynecologist, who as one aspect of his medical practice performs abortions. Under North Carolina law and federal law, abortions are lawful medical procedures. *See, e.g.*, N.C. Gen. Stat. § 14-45.1 (1986).

2. The defendants have carried out activities designed to coerce Dr. Kaplan to stop performing abortions.

3. The defendants' activities have included at least twelve instances of targeted picketing at the home of Dr. Kaplan and his family. On these occasions, groups including defendants Linda Winfield,

Bill Winfield, and other defendants have walked up and down the Kaplans' street, Waycross Drive, carrying signs that name Dr. Kaplan. Although these moving pickets go beyond the frontage of the Kaplans' house, they remain largely in sight of the Kaplans' house. The circumstances make clear that the defendants are targeting the Kaplans and are harming the Kaplans by manifesting a physical presence just outside their house. These circumstances include, among other things, statements by defendant William Winfield that he and the Prolife Action League of Greensboro will stop coming to the Kaplans' neighborhood only when Dr. Kaplan stops performing abortions.

4. Defendant Ronald Benfield has made a direct threat on Dr. Kaplan's life. In addition, the other defendants have engaged in conduct toward the Kaplans that the Kaplans have reasonably interpreted as threatening.

5. The Kaplans are likely to prevail on the merits of this case under their claims for intentional infliction of emotional distress and private nuisance.

6. The Kaplans will suffer irreparable harm unless the Court enjoins the defendants from carrying out targeted residential picketing against them and from threatening them.

7. The defendants have picketed against Dr. Kaplan's performance of abortions not only at the Kaplans' house, but at several other locations as well. These locations include the edge of the Kaplans' neighborhood, Dr. Kaplan's private medical office, and the Women's Pavilion in Greensboro. The defendants' own actions show that they have many alternative forums and means of communicating their concerns, other than picketing in the Kaplans' immediate neighborhood.

8. Since the defendants have ample alternative means of communicating their views, the First Amendment allows the Court to enter a narrowly tailored, content-neutral injunction to protect the Kaplans' residential peace, privacy, and security. Under the analysis stated by the U.S. Supreme Court in *Frisby v. Schultz,* 487 U.S. 47[4, 101 L.Ed.2d 420] (1988), the Court may enter an injunction to uphold these important interests by prohibiting targeted residential picketing, even if that targeted picketing goes beyond just one house. The Court specifically relies on the reasoning in several post-*Frisby* decisions that recognize that the First Amendment allows such an injunction. *See Northeast Women's Center, Inc. v. McMonagle,* 939 F.2d 57, 65-68, 71 (3d Cir. 1991); *Boffard v. Barnes,* [248 N.J. Super. 501,] 591 A.2d 699, 702 (N.J. Super. Ct. Ch. Div. 1991); *Klebanoff v. McMonagle,* [380 Pa. Super. 545,] 552 A.2d 677, 678, 682 (Pa. Super. Ct. 1988), *appeal denied,* [522 Pa. 620,] 563 A.2d 888 (Pa. 1989); *Valenzuela v. Aquino,* 800 S.W.2d 301, 304-06 (Tex. Ct. App. 1990), *petition for review granted* (Tex. May 1, 1991), [*aff'd in part, rev'd in part,* No. D-0740, —— S.W.2d ——, 1993 WL 141143 (Tex. May 5, 1993)].

9. Given the defendants' repeated actions against Dr. Kaplan and his family over the last year, the Court finds that it should grant equitable relief to protect the Kaplans from targeted picketing and other threatening conduct, while at the same time tailoring that relief to protect the defendants' exercise of their First Amendment rights. The defendants' conduct in the Kaplans' neighborhood, and the physical characteristics of that neighborhood, indicate that without an injunction prohibiting picketing and similar activities on the Kaplans' street and within 300 feet of that street, the interest in upholding residential peace, privacy, and security would

go unserved. An injunction of this sort will be narrowly tailored to serve the interest in protecting residential peace, privacy, and security.

10. An injunction to stop targeted residential picketing in the Kaplans' neighborhood is based not on the content of any would-be picketers' speech, but on the effects caused by the picketers' physical presence.

WHEREFORE, based on these findings, THE COURT ENJOINS AND RESTRAINS the defendants, their officers, agents, servants, and employees, and all persons in active concert or participation with them who receive actual notice of this order:

A. from picketing, parading, marching, or demonstrating anywhere on Waycross Drive in Greensboro, North Carolina;

B. from picketing, parading, marching, or demonstrating anywhere within 300 feet of the center line of Waycross Drive, including any parts of any other street that fall within 300 feet of the center line of Waycross Drive;

C. from threatening or communicating threats to any of the plaintiffs, at their home or elsewhere; and

D. from personally confronting any of the plaintiffs in a threatening manner, at their home or elsewhere.

The Court orders copies of this order to be served on the identified defendants in this action, and on the other defendants as soon as they are identified. A person will have actual notice of this order when he or she has personally received a true copy of it.

This injunction will take effect as soon as the plaintiffs jointly post a $2,000 cash or secured bond, pursuant to [G.S. 1A-1,] Rule 65(c) of the North

Carolina Rules of Civil Procedure. Unless earlier modified by consent or by the Court, this injunction will remain in effect until this manner is resolved by a final judgment.

This injunction was entered in open court, 10 February 1992, at 1:55 p.m.

As evidenced by the attached bond filing, the plaintiffs posted the required bond on 10 February 1992, at 4:53 p.m.

The undersigned Judge Presiding retains jurisdiction of this matter for purposes of any further proceedings in this case; including any matters pertaining to this Preliminary Injunction Order.

This written order is entered this 20[th] day of February, 1992 at 11:00 a.m.

From the trial court's 20 February 1992 order granting the preliminary injunction, defendants appeal.

Smith Helms Mulliss & Moore, by Alan W. Duncan and Matthew W. Sawchak, for plaintiff-appellees.

Arthur J. Donaldson and Walter M. Weber for defendant-appellants Prolife Action League of Greenboro, William H. Winfield, Jr., and Linda Winfield.

William G. Simpson, Jr., Legal Director, North Carolina Civil Liberties Union Legal Foundation, and Tharrington, Smith & Hargrove, by Burton Craige, for Amicus Curiae North Carolina Civil Liberties Union Legal Foundation.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey, and Ann E. Allen, General Counsel, The American College of Obstetricians & Gynecologists, for Amicus Curiae The American College of Obstetricians & Gynecologists.

EAGLES, Judge.

I. *Background*

This appeal arises from the trial court's grant of a preliminary injunction which restrained the manner and place in which defendants could protest in the streets adjoining plaintiffs' home. Defendants bring forward eleven assignments of error challenging several of the trial court's findings and the constitutionality of the order granting the preliminary injunction. Upon careful consideration of the briefs, transcript, and record, we affirm.

Initially, we note that this case presents a direct confrontation of fundamental Constitutional principles. On the one hand, it is well established that "a bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 105 L.Ed.2d 342, 360 (1989) (citations omitted); U.S. Const. Amend. I ("Congress shall make no law . . . abridging the freedom of speech"); U.S. Const. Amend XIV (providing that the provisions of the First Amendment are applicable to the states); N.C. Const. Art. I, § 14 ("Freedom of speech and of the press are two of the great bulkwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse"); *Carey v. Brown*, 447 U.S. 455, 460, 466-67, 65 L.Ed.2d 263, 269, 273 (1980) ("There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, . . . expressive conduct that falls within the First Amendment's preserve [is regulated]"; and noting that public issue picketing "has always rested on the highest rung of the hierarchy of First Amendment values"); *Corum v. University of North Carolina*, 330 N.C. 761, 781, 413 S.E.2d 276, 289, *cert. denied*, —— U.S. ——, 121 L.Ed. 2d 431 (1992) ("The words 'shall never be restrained' [in N.C. Const. Art. I, § 14] are a direct personal guar-

antee of each citizen's right of freedom of speech"). On the other hand, "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." *United States v. Orito,* 413 U.S. 139, 142, 37 L.Ed.2d 513, 517 (1973) (citations omitted); *Carey,* 447 U.S. at 471, 65 L.Ed.2d at 276 ("Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. . . . The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society"); *Frisby v. Schultz,* 487 U.S. 474, 485, 101 L.Ed.2d 420, 432 (1988) ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom").

It is significant that plaintiff Dr. Kaplan neither maintains a medical office at his residence nor treats any patients there. *See Frisby,* 487 U.S. at 488, 101 L.Ed.2d at 434. "[T]he North Carolina General Assembly has made a 'clear and deliberate choice' regarding the competing values at issue by choosing to make those abortions performed in accordance with the provisions of N.C. Gen. Stat. § 14-45.1 lawful." *State v. Thomas,* 103 N.C. App. 264, 267, 405 S.E.2d 214, 216, *disc. rev. denied,* 329 N.C. 792, 408 S.E.2d 528 (1991); *see Azzolino v. Dingfelder,* 315 N.C. 103, 113, 337 S.E.2d 528, 535 (1985), *cert. denied,* 479 U.S. 835, 93 L.Ed.2d 75 (1986), *reh'g denied,* 319 N.C. 227, 353 S.E.2d 401 (1987). As the trial court correctly noted, our General Assembly has provided that abortions are lawful medical procedures when "performed by a physician licensed to practice medicine in North Carolina . . ." G.S. 14-45.1 (a), (b). *See Planned Parenthood v. Casey,* —— U.S. ——, ——, ——, 120 L.Ed.2d 674, 694, 716 (1992). Dr. Kaplan is a licensed physician engaged in a lawful

occupation under the laws of our State. The freedom to engage in a lawful occupation comes within those liberties protected by the Fourteenth Amendment to the United States Constitution. *Meyer v. Nebraska,* 262 U.S. 390, 399, 67 L.Ed. 1042, 1045 (1923); *Nova University v. The Board of Governors,* 305 N.C. 156, 164, 287 S.E.2d 872, 878 (1982); *Presnell v. Pell,* 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979). In sum, here we are presented with a situation in which

> [c]onflicts in the exercise of rights arise and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of . . . speech . . . guaranteed by the Fourteenth Amendment, and on the other the right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery. Courts, no more than Constitutions, can [sic] intrude into the consciences of men . . . but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech . . . and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind.

Jones v. Opelika, 316 U.S. 584, 593-94, 86 L.Ed.2d 1691, 1699-1700 (1942) (footnotes omitted), *vacated on other grounds,* 319 U.S. 103, 87 L.Ed 1290 (1943); *see Casey,* —— U.S. at ——, 120 L.Ed.2d at 697 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code"); *see also Hague v. C.I.O.,* 307 U.S. 496, 515-16, 83 L.Ed. 1423, 1436-37.

With these important competing principles in mind, we proceed with an examination of the preliminary injunction before us.

II. *Appealability of the Order Granting a Preliminary Injunction*

On 20 February 1992, the trial court issued an order granting plaintiffs' motion for a preliminary injunction. Defendants appealed from that order. Since defendants elected to appeal before the ultimate questions raised by the pleadings are decided at a trial on the merits, the sole question before us is whether the trial court erred in its issuance of the preliminary injunction.

"As a general rule, a preliminary injunction 'is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation.' " *A.E.P. Industries v. McClure,* 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (*quoting Investors, Inc. v. Berry,* 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). G.S. 1-485 provides:

> A preliminary injunction may be issued by order . . . :
>
> > (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff . . . .

G.S. 1-485. *See* G.S. 1A-1, Rule 65. Regarding the appealability of preliminary injunctions, our Supreme Court has stated:

> A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits.

G.S. § 1A-1, Rule 65. Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination. As we recently stated in *State v. School,* 299 N.C. 351, 357-58, 261 S.E.2d 908, 913, *appeal dismissed,* 449 U.S. 807 (1980):

> The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. (Citations omitted.)

See Waters v. Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); *Pruitt v. Williams,* 288 N.C. 368, 218 S.E.2d 348 (1975).

A.E.P. Industries, 308 N.C. at 400-01, 302 S.E.2d at 759. Thus, in addressing the "threshold question" presented by this appeal, *id.* at 400, 302 S.E.2d at 759, we conclude that given the important First Amendment principles at issue, substantial rights of the defendants have been affected. *Cf. Frisby,* 487 U.S. at 479, 101 L.Ed.2d at 428 (appeal from order granting a prelimi-

nary injunction against town seeking to enforce ordinance against residential picketers presented a question of "substantial importance"); *Elrod v. Burns,* 427 U.S. 347, 373, 49 L.Ed.2d 547, 565 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Accordingly, we address the issues presented by defendants in this appeal.

III. *The Standard of Review for Preliminary Injunctions*

In our review of the trial court's order granting a preliminary injunction, "a decision by the trial court to issue . . . an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *Wrightsville Winds Homeowners' Assn. v. Miller,* 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990), *disc. rev. denied,* 328 N.C. 275, 400 S.E.2d 463 (1991) (*citing Robins & Weill v. Mason,* 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *disc rev. denied,* 312 N.C. 495, 322 S.E.2d 559 (1984)). *See Edmisten, Attorney General v. Challenge, Inc.,* 54 N.C. App. 513, 516, 284 S.E.2d 333, 335-36 (1981) ("there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error"); *Conference v. Creech,* 256 N.C. 128, 123 S.E.2d 619 (1962); *Lance v. Cogdill,* 238 N.C. 500, 78 S.E.2d 319 (1953).

In determining whether a preliminary injunction was properly issued, we examine the trial court's inquiry, which is a two stage process. "The first stage of the inquiry is . . . whether plaintiff is able to show likelihood of success on the merits." *A.E.P. Industries,* 308 N.C. at 401, 302 S.E.2d at 760. The second stage of the inquiry considers whether " 'plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the

protection of a plaintiff's rights during the course of litigation.' " *Id.* at 401, 302 S.E.2d at 759-60 (*quoting Investors, Inc.,* 293 N.C. at 701, 239 S.E.2d at 574). "To constitute irreparable injury it is *not* essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman,* 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949) (emphasis added) (citations omitted); *A.E.P. Industries,* 308 N.C. at 407, 302 S.E.2d at 763; *Wrightsville Winds Homowners' Assn.,* 100 N.C. App. at 535, 397 S.E.2d at 347. Additionally, "[t]he judge in exercising his discretion should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160, *disc. rev. denied, appeal dismissed,* 295 N.C. 471, 246 S.E.2d 12 (1978) (*citing Huggins v. Board of Education,* 272 N.C. 33, 157 S.E.2d 703 (1967)). Finally, we note that the findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits. *Schloss v. Jamison,* 258 N.C. 271, 276-77, 128 S.E.2d 590, 594 (1962); *Huskins v. Hospital,* 238 N.C. 357, 362, 78 S.E.2d 116, 120-21 (1953).

IV. *Analysis of Plaintiffs' Claims as a Basis for the Preliminary Injunction*

In their fifth assignment of error, defendants contend that the trial court "erred by concluding that the Kaplans were likely to prevail on the merits of their claims for private nuisance and intentional infliction of emotional distress."

"The burden is on the plaintiffs to establish their right to a preliminary injunction." *Pruitt v. Williams,* 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975) (*citing* G.S. 1A-1, Rule 65(b); *Setzer v. Annas,* 286 N.C. 534, 212 S.E.2d 154 (1975); *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E.2d 545 (1968)). Plaintiffs' complaint alleged seven separate causes of action: 1) private nuisance, *see* G.S. 1-539; 2) public nuisance, *see* G.S. 1-539; 3) intentional infliction of emotional distress; 4) invasion of privacy; 5) violations of the North Carolina Racketeer Influenced and Corrupt Organizations Act, *see* G.S. Chapter 75D; 6) violations of the federal Racketeer Influenced and Corrupt Organization Act (later dismissed by plaintiffs on 21 January 1992 pursuant to G.S. 1A-1, Rule 41(a)(1)), and 7) violations of G.S. 99D-1 (interference with civil rights). Accordingly, plaintiffs offered six legal theories to support their preliminary injunction motion. After a hearing on 10 February 1992, the trial court specifically referred to two of plaintiffs' claims (intentional infliction of emotional distress and private nuisance, *see* finding of fact No. 5) in determining that the preliminary injunction should be granted. We now examine each of these claims.

A. *Intentional Infliction of Emotional Distress*

Defendants argue that plaintiffs have failed to show a likelihood of success on their intentional infliction of emotional distress claim at a trial on the merits. We agree.

In their complaint, plaintiffs' claim for the intentional infliction of emotional distress was set forth in the following paragraphs.

> 37. By organizing and executing their campaign of intimidation and harassment against the Kaplans, particularly Jacob and David Kaplan, the defendants have engaged and are engaging in outrageous conduct. The defendants intend that this conduct

> cause the Kaplans severe emotional distress. The defendants' campaign, indeed, seeks to use exactly this emotional distress to drive Dr. Kaplan out of part of his medical practice.
>
> 38. This intentional conduct is causing the Kaplans, especially Marguerite Kaplan and the Kaplans' children, Jacob and David Kaplan, severe and irreparable fear, embarrassment, and humiliation.

In *Dickens v. Puryear,* 302 N.C. 437, 446-47, 276 S.E.2d 325, 331-32 (1981), our Supreme Court stated:

> The tort of intentional infliction of mental distress is recognized in North Carolina. *Stanback v. Stanback,* 297 N.C. 181, 254 S.E.2d 611 (1979). "[L]iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" *Id.* at 196, 254 S.E.2d at 622, *quoting* Prosser [Law of Torts], § 12, p. 56 [(4th Ed. 1971)]. . . .
>
> The tort alluded to in *Stanback* is defined in the Restatement § 46 as follows:
>
> > "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."
>
> The holding in *Stanback* was in accord with the Restatement definition of the tort of intentional infliction of mental distress. We now reaffirm this holding.

Our Supreme Court then pronounced in *Dickens* that the essential elements of the tort of the intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens,* 302

N.C. at 452, 276 S.E.2d at 335; *Waddle v. Sparks,* 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). *See also* Restatement (Second) of Torts § 46(1) (1965).

Later, in *Waddle v. Sparks,* 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992), our Supreme Court adopted the following definition of the "severe emotional distress" element of the tort of the intentional infliction of emotional distress:

> the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Id. (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.,* 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied,* 327 N.C. 644, 399 S.E.2d 133 (1990) (emphasis added)). Our Supreme Court then proceeded to further discuss the element of "severe emotional distress" and the rationale for its high standard of proof:

> Support for a high standard of proof on the severe emotional distress element can also be found in the second Restatement of Torts, from which we have derived most of our present standards for the remaining elements of intentional infliction of emotional distress.
>
> > The rule stated in this section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nau-

> > sea. *It is only where it is extreme that the liability arises.* Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.* The intensity and the duration of the distress are factors to be considered in determining its severity. . . . It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Restatement (Second) of Torts § 46 cmt. j (1965) (emphasis added). *See also Gagne v. Northwestern Nat'l Ins. Co.,* 881 F.2d 309 (6th Cir. 1989) (applying Ohio law); *Polk v. Yellow Freight System, Inc.,* 801 F.2d 190 (6th Cir. 1986) (applying Michigan law); and *Hubbard v. United Press Internat'l, Inc.,* 330 N.W.2d 428 (Minn. 1983).

As the drafters of the Restatement point out, the rationale for limiting or restricting liability for intentional infliction of emotional distress is simple:

> > The rough edges of our socety are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.
>
> Restatement (Second) of Torts § 46 cmt. d (1965).

Waddle, 331 N.C. at 83-84, 414 S.E.2d at 27-28 (emphasis in original). Citing our Supreme Court's discussion of the element of "severe emotional distress" set

forth in *Waddle*, 331 N.C. at 83-85, 414 S.E.2d at 27-28, defendants argue that

> The Kaplans have not even encountered "rough language" from the Winfields. Instead, the Kaplans face a peaceful but pointed public protest on a highly emotional public issue—abortion. The Kaplans may be angry, upset, or irritated at the Winfield's pro-life marching, but putting up with such protest is no more than the price of freedom in a contentious society.
>
> The Kaplans allege in conclusory fashion that they have suffered "severe and irreparable fear, embarrassment, and humilitation." The Kaplans, however, have alleged no specific facts whatsoever to show that any of them have acquired the type of "severe and disabling emotional or mental condition" required [by *Waddle*] to establish a claim of intentional infliction of emotional distress.

Plaintiffs argue that "[t]he decision defendants cite as setting a new standard for emotional distress, *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992), came down after the conduct [which began in 1991], the complaint [filed 14 January 1992], and the preliminary injunction [entered 10 February 1992] in this case. Even if this standard applies retroactively, the record supports the conclusion that the Kaplans will prove severe emotional distress." We disagree. First, the standard for severe emotional distress discussed in *Waddle* was applied to the *Waddle* plaintiffs, who filed their complaint in that action on 20 April 1988, over two years prior to the conduct complained of here. *Id.* at 76, 414 S.E.2d at 23. Accordingly, we too must apply *Waddle* here to determine whether plaintiffs have established a likelihood of success on the merits.

We conclude that plaintiffs have not established a likelihood of success on the merits as to their intentional in-

fliction of emotional distress claim. The record is devoid of any indication of the existence "of any medical documentation of plaintiffs' alleged 'severe emotional distress' " or of "any other forecast of evidence of 'severe and disabling' psychological problems within the meaning of the test laid down in *Johnson v. Ruark*, 327 N.C. at 304, 395 S.E.2d at 97." *Waddle*, 331 N.C. at 85, 414 S.E.2d at 28. Instead, as support for their argument, plaintiffs merely point to: 1) the allegations of the verified complaint stating that the plaintiffs were "frightened," "intimidated," and "upset" and have suffered "severe and irreparable fear, embarrassment, and humiliation" and; 2) affidavits from plaintiffs' "friends and colleagues [showing that they] have observed the [plaintiffs'] distress" essentially supporting the complaint's allegations. This evidence does not indicate a likelihood of meeting the "high standard of proof" required by *Waddle*. *Id.* at 83, 414 S.E.2d at 27. On the record now before us, we conclude that there is not sufficient competent evidence to support the trial court's decision that there is a likelihood that plaintiffs will succeed on their intentional infliction of emotional distress claim at a trial on the merits. *Wrightsville Winds Homeowners' Assn.*, 100 N.C. App. at 535, 397 S.E.2d at 346.

B. *Private Nuisance*

Defendants contend that "[t]he Winfields [defendants] did not misuse any property under their control. Therefore, there can be no private nuisance." We disagree. To support this argument, defendants cite excerpts from two cases from our Supreme Court. *Watts v. Manufacturing Co.*, 256 N.C. 611, 617, 124 S.E.2d 809, 813 (1962) (" 'The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another' "); *Morgan v. Oil Co.*, 238 N.C. 185, 193, 77

S.E.2d 682, 689 (1953) ("[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor"). "The essence of a private nuisance is an interference with the use and enjoyment of land. The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." Prosser and Keeton on the Law of Torts, § 87, p. 619 (5th ed. 1984) (footnote omitted). Regarding the tort of private nuisance and the issuance of injunctive relief based upon a claim of private nuisance, this Court has stated:

> A private nuisance action may arise from the defendant's intentional and unreasonable conduct. . . . *Pendergrast v. Aiken,* 293 N.C. 201, 236 S.E.2d 787 (1977); Restatement (Second) of Torts Sec. 822 (1979); see Prosser and Keeton on the Law of Torts Sec. 87, at 622-23 (W. Keeton 5th ed. 1984) (elements of intentional nuisance). . . . [W]e must apply the law of intentional private nuisance in evaluating plaintiffs' claim for injunctive relief.

The degree of unreasonableness of the defendants' conduct determines whether damages or permanent injunctive relief is the appropriate remedy for an intentional private nuisance. Unreasonable interference with another's use and enjoyment of land is grounds for damages. *Pendergrast v. Aiken; see Kent v. Humphries,* 303 N.C. 675, 281 S.E.2d 43 (1981). To award damages, the defendant's conduct, in and of itself, need not be unreasonable. Prosser, *supra,* Sec. 87, at 623. In contrast, injunctive relief requires proof that the defendant's conduct itself is unreasonable; the gravity of the harm to the plaintiff must outweigh the utility of the conduct of the defendant. *Pendergrast v. Aiken.* "[I]t is necessary to show that defendant's conduct in carrying on the activity at the place and at the time the injunction is sought is unreasonable." Prosser, *supra,* Sec. 88A, at 631 (footnote omitted). The *Pendergrast* Court set forth the criteria for injunctive relief:

> Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. . . . Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence.

293 N.C. at 217, 236 S.E.2d at 797 (citations omitted); *see also* Prosser, *supra,* Sec. 89, at 640-41.

Mayes v. Tabor, 77 N.C. App. 197, 199-200, 334 S.E.2d 489, 490-91 (1985). In addressing the intentional interference requirement of a private nuisance claim, Prosser emphasizes that the interest protected is the use and enjoyment of a plaintiff's property and further explains that the fact that a defendant stands upon property other than his own does not preclude a claim for private nuisance:

> When the defendant engages in an activity with knowledge that this activity is interfering with the

> plaintiffs in the use and enjoyment of his property, and the interference is substantial and unreasonable in extent, the defendant is liable, and the monetary recovery is simply a cost of engaging in the kind of activity in which the defendant is engaged. *This is so whether the conduct is committed in the air (as by low-flying airplanes), on the highways, or on private property.*

§ 87, p. 625 (emphasis added) (footnote omitted); *Morgan*, 238 N.C. at 193, 77 S.E.2d at 689 ("the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that *any* substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by *any* type of liability forming conduct is a private nuisance"). *See Women's Health Care Services v. Operation Rescue*, 773 F.Supp. 258, 269 (D.Kan. 1991) (holding that plaintiffs had shown a substantial likelihood of ultimately demonstrating the existence of a claim of private nuisance against defendants who protested on streets). *See generally*, Nuisances, 66 C.J.S. § 88(a) ("It is not necessary in order to charge a person with liability for a nuisance that he should be the owner of the property on which it is created, but it is sufficient if he created it"). We conclude that the two cases cited by defendants do not preclude plaintiffs' private nuisance claim: the excerpt from *Watts*, 256 N.C. at 617, 124 S.E.2d at 813, refers to the historical origins of private nuisance, and the excerpt from *Morgan*, 238 N.C. at 193, 77 S.E.2d at 689, states one manner, but *not the only* manner, in which a private nuisance claim may arise.

We also conclude that the trial court here did not err in its balancing of the utility of defendants' conduct against the gravity of the harm to plaintiffs. *Mayes*, 77 N.C. App. at 200, 334 S.E.2d at 490-91; *Pendergrast*, 293 N.C. at 217, 236 S.E.2d at 797. While peaceful picketing is protected by the First Amendment, *Thornhill v. Alabama*, 310 U.S. 88, 95, 104, 84 L.Ed. 1093, 1098, 1103 (1940), peaceful residential picketing is not "beyond the reach of uniform and nondiscriminatory regulation." *Carey*, 447 U.S. at 470, 65 L.Ed.2d at 275, and, as discussed *infra* Part VII.C., ample alternative channels of communication exist for defendants to express their views. Numerous opinions have examined the substantial concerns regarding the captive audience that a home provides. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 738, 25 L.Ed.2d 736, 744 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere"); *Frisby*, 487 U.S. at 486, 487, 101 L.Ed.2d at 433, 433 ("The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech" and emphasizing that "[t]he devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt"); *Klebanoff v. McMonagle*, 380 Pa. Super. 545, 549-50, 552 A.2d 677, 679 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989) ("The home serves to provide, among other things, a refu[g]e from today's complex society where we are inescapably captive audiences for many purposes. Normally, outside of the home, consonant with the Constitution, we expect individuals to avoid unwanted speech, 'simply by averting [their] eyes.' But such avoidance within the walls of one's own house is not required"); *Trojan Elec. & Mach. Co. v. Heusinger*, 162 A.D.2d 859, 860, 557 N.Y.S.2d 756, 758-59 (1990); *Murray v. Lawson*, 264 N.J. Super. 17, 30, 624 A.2d 3, 10 (App. Div. 1993), *petition for cert. granted*, —— A.2d —— (No. C-932, 36,720, May 27, 1993); *Boffard v. Barnes*, 248 N.J. Super. 501, 506, 591 A.2d 699, 701 (Ch. Div. 1991). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 748, 57 L.Ed.2d 1073, 1093, *reh'g denied*, 439 U.S. 883, 58 L.Ed.2d 198 (1978); *Kovacs v. Cooper*,

336 U.S. 77, 86-87, 93 L.Ed. 513, 522, *reh'g denied*, 336 U.S. 921, 93 L.Ed. 1083 (1949); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 542, 65 L.Ed.2d 319, 331 (1980). *Compare Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11, 45 L.Ed.2d 125, 131-32 (1975); *Spence v. Washington*, 418 U.S. 405, 412, 41 L.Ed.2d 842, 848 (1974); *Cohen v. California*, 403 U.S. 15, 21, 29 L.Ed.2d 284, 291-92, *reh'g denied*, 404 U.S. 876, 30 L.Ed.2d 124 (1971). The First Amendment is not the guarantor of a captive audience; rather, the First Amendment ensures the reasonable opportunity to be heard. *Bering v. SHARE*, 106 Wash.2d 212, 232, 721 P.2d 918, 930 (1986), *cert. dismissed*, 479 U.S. 1050, 93 L.Ed.2d 990 (1987); *Frisby*, 487 U.S. at 487, 101 L.Ed.2d at 433 ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech"); *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 647, 69 L.Ed.2d 298, 306 (1981) ("the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"). Defendants' reasonable opportunity to be heard exists through the ample alternative channels of communication available to defendants.

We conclude that there is ample competent evidence to support the trial court's decision that there is a reasonable likelihood that plaintiffs will prevail on their private nuisance claim at a trial on the merits. *Compare N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1361-62 (2nd Cir. 1989), *cert. denied*, 495 U.S. 947, 109 L.Ed.2d 532 (1990) (public nuisance claim brought on behalf of the City of New York); Women's Health Care Services, 773 F.Supp. at 269 (D.Kan. 1991) (holding that plaintiffs had shown a substantial likelihood of ultimately demonstrating the existence of a claim of public nuisance as well as private

nuisance against defendants who protested on streets). Given the substantial disruption of plaintiffs' residential privacy due to defendants' actions, we also conclude that the trial court correctly concluded that plaintiffs would likely sustain irreparable loss unless the injunction was issued at the time of the hearing. *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759, in that "the injury is one to which the complainant[s] should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier*, 231 N.C. at 50, 55 S.E.2d at 925 (citations omitted); *see Franklin Chalfont Associates v. Kalikow*, 392 Pa. Super. 452, 467, 573 A.2d 550, 558 (1990) (privacy interest in one's own home is "an interest which could be vindicated only by restoring it through injunctive relief"; *citing Klebanoff v. McMonagle*, 380 Pa. Super. 545, 552 A.2d 677 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989)).

C. *Summary*

In sum, although the trial court erred as to plaintiffs' likelihood of success with the intentional infliction of emotional distress claim, we conclude that plaintiffs are likely to succeed on at least one of their claims (private nuisance) at a trial on the merits and that this claim warrants injunctive relief. "Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) (*citing Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778 (1989); *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956)). Accordingly, we consider defendants' other assignments of error concerning the trial court's findings and the specific injunctive relief ordered.

V. *Trial Court's Finding Regarding Targeted Residential Picketing*

In their third, sixth, ninth, and tenth assignments of error, defendants contend that the trial court "erred by finding that the Winfields have engaged in targeted residential picketing." We disagree.

Here, we conclude that defendants' activities are narrowly directed at plaintiffs' household, not at the public. *Frisby*, 487 U.S. at 486, 101 L.Ed.2d at 433. The record includes *inter alia* the following evidence showing defendants' targeted picketing of plaintiffs' home: a statement by defendant William Winfield that he and the Prolife Action League of Greensboro would cease coming to the Kaplans' neighborhood only when Dr. Kaplan stopped performing abortions; evidence that on twelve separate occasions defendants have demonstrated on Waycross Drive in groups as large as approximately twenty-five people; evidence that signs used by the demonstrators specifically name Dr. Kaplan; literature disseminated by the Prolife Action League listing Dr. Kaplan as one of the "major abortionists from Greensboro that go to the clinics where we are praying"; evidence that defendants made similar demands in picketing the residences of other Women's Pavilion staff members, including an affidavit from Dr. Mark Anderson stating that "Mr. Winfield [defendant] told me that they would stop when I stopped 'killing babies.' . . . Because I wished these activities to stop, and based upon my conversation with Mr. Winfield, I have stopped performing abortions at the Women's Pavilion," and; evidence (including defendants' own admission) that the street in front of plaintiffs' home marks approximately the halfway point of the path of defendants' marches. All this evidence tends to support the trial court's finding that defendants engaged in targeted residential picketing. Since there is sufficient competent evidence to support the trial court's finding that defendants have engaged in targeted residential picketing,

it is conclusive on appeal. Accordingly, these assignments of error fail.

VI. *Trial Court's Findings Regarding Defendants' Activities*

In their second assignment of error, defendants contend that the trial court "erred by finding that the Winfields' activities are coercive," specifically taking exception to the finding in paragraph No. 2 of the order that "[t]he defendants have carried out activities designed to *coerce* Dr. Kaplan to stop performing abortions." (Emphasis added). We disagree.

It is well established in First Amendment jurisprudence that one's mere claim that another's "expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 29 L.Ed.2d 1, 5 (1971); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 73 L.Ed.2d 1215, 1234, *reh'g denied*, 459 U.S. 898, 74 L.Ed.2d 160 (1982). The trial court's order does not refer to defendant's intent to exercise a coercive impact as being the basis for injunctive relief; rather the order specifically emphasizes that the court granted injunctive relief "to protect the Kaplans [plaintiffs] from targeted picketing and other threatening conduct." Furthermore, defendants concede in their affidavits and in their appellate brief that "[t]he Winfields admittedly aim to stop Dr. Kaplan and others from performing abortions." Since there is sufficient evidence to support this finding, it is conclusive on appeal. Accordingly, this assignment of error is overruled.

VII. *Injunctive Relief*

Having determined that the trial court's decision to grant an injunction was appropriate and that the trial court's challenged findings were supported by the evidence, our inquiry now focuses on the scope of the relief

granted. In scrutinizing the relief afforded by the preliminary injunction, we adopt the analysis utilized in *Frisby v. Schultz*, 487 U.S. 474, 101 L.Ed.2d 420 (1988). In *Frisby*, the United States Supreme Court upheld as constitutional a town ordinance which proscribed "the following flat ban on all residential picketing: 'It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.'" *Id.* at 477, 101 L.Ed.2d at 426-27. The constitutionality of the City of Greensboro ordinance is not at issue here. *See* Greensboro, N.C. Code of Ordinances § 26-157(b). However, we find the *Frisby* analysis appropriate and helpful in our inquiry regarding the constitutionality of the trial court's preliminary injunction. This inquiry essentially mirrors the approach utilized by federal appellate courts in analyzing injunctions against picketers in factual situations similar to that presented here, *see Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 63 (3rd Cir. 1991), and has been adopted by other state courts as well, *see Klebanoff v. McMonagle*, 380 Pa. Super. 545, 548, 552 A.2d 677, 678 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989); *Dayton Women's Health Ctr. v. Enix*, 68 Ohio App.3d 579, 588, 589 N.E.2d 121, 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women's Health Center, Inc.*, —— U.S. ——, 120 L.Ed.2d 903 (1992).

The streets of Greensboro are traditional public fora, *Frisby*, 487 U.S. at 481, 101 L.Ed.2d at 429, *Hague v. C.I.O.*, 307 U.S. 496, 515, 83 L.Ed. 1423, 1436 (1939), and accordingly, *Frisby* provides that the preliminary injunction

> must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

> "In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

Frisby, 487 U.S. at 481, 101 L.Ed.2d at 429 (*quoting Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 804 (1983)) (alteration in original).

A. *Content-Neutral Requirement*

The first inquiry in *Frisby*, 487 U.S. at 481, 101 L.Ed.2d at 429, is whether the restriction is content-neutral. In their tenth assignment of error, defendants contend that the trial court "erred by concluding that its injunction is not a content-based restriction on speech." We disagree.

"Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul*, —— U.S. ——, ——, 120 L.Ed.2d 305, 317 (1992) (citations omitted). However, the preliminary injunction here is content-neutral.

> Content-neutral regulations of expression are "those that 'are *justified* without reference to the content of the regulated speech.'" *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). The primary concern of content-neutrality is that no speech

> or expression of a "particular content" is "single[d] out" by the government for better or worse treatment. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771, 96 S.Ct. at 1830, *see also Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 67, 96 S.Ct. 2440, 2450-51, 49 L.Ed.2d 310 (1976) (government regulation of expression may not be sympathetic or hostile toward communicator's message). The test is neutrality.

N.Y. State Nat. Organization for Women v. Terry, 886 F.2d 1339, 1363 (2nd Cir. 1989), *cert. denied*, 495 U.S. 947, 109 L.Ed.2d 532 (1990) (emphasis in original) (alteration in original).

A close examination of the preliminary injunction here reveals that the injunction is content-neutral. The trial court's injunction prohibits picketing within a limited protected zone near plaintiffs' residence without referring to the subject matter of the picketers' expression. The injunction makes no mention of abortion or any other substantive issue. It does not flatly ban picketing throughout residential areas nor does it prohibit anti-abortion picketing while permitting residential picketing having other aims. *Dayton Women's Health Ctr. v. Enix*, 68 Ohio App.3d 579, 588, 589 N.E.2d 121, 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women's Health Center, Inc.*, —— U.S. ——, 120 L.Ed.2d 903 (1992). The injunction provides no invitation to subjective or discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 113, 33 L.Ed.2d 222, 230 (1972). We conclude that the trial court did not focus on the effect or impact of defendants' message on potential listeners, *Boos v. Barry*, 485 U.S. 312, 321, 99 L.Ed.2d 333, 344-45 (1988), but rather on defendants' physical presence having a deliberate intimidating effect on plaintiffs while at their home. *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 62-63 (3rd Cir. 1991). *See*

also Horizon Health Center, v. Felicissimo, 263 N.J. Super. 200, 214, 622 A.2d 891, 898 (App. Div. 1993). Accordingly, this assignment of error fails.

B. *Narrowly-Tailored Requirement*

The next inquiry examines whether the restriction "is 'narrowly tailored to serve a significant government interest' and whether it 'leave[s] open ample alternative channels of communication.'" *Frisby*, 487 U.S. at 482, 101 L.Ed.2d at 430 (*quoting Perry Education Assn.*, 460 U.S. at 45, 74 L.Ed.2d at 804) (alteration in original). Initially, we note that *Frisby* established that the "protection of residential privacy" from the "devastating effect of targeted picketing on the quiet enjoyment of the home" is a significant government interest. *Frisby*, 487 U.S. at 484, 486, 101 L.Ed.2d at 431, 433. *See generally State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L.Ed.2d 406 (1987) ("The sanctity of the home is a revered tenet of Anglo-American jurisprudence. The law recognizes the special status of the home . . . . And the law has consistently acknowledged the expectation of and right to privacy within the home"). A restriction "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485, 101 L.Ed.2d at 432 (*citing City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10, 80 L.Ed.2d 772, 789-90 (1984)).

In their seventh, eighth, ninth, and eleventh assignments of error, defendants challenge the manner in which the injunctive relief was tailored by contending that the trial court erred "by enjoining the Winfields from 'picketing, parading, marching, or demonstrating' along the entire length of a street [Waycross Drive] plus 300 feet in any direction from that street."

1. *Prior Restraint*

First, defendants argue that *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 29 L.Ed.2d 1 (1971) "bars injunctive relief here" and that the injunction is an unlawful prior restraint. We find *Keefe,* 402 U.S. 415, 29 L.Ed.2d 1, readily distinguishable. The *Keefe* Court rejected the state court's injunction (prohibiting the defendants' distribution of literature in a residential neighborhood) because it would have operated to suppress public expression without any demonstrable threat of a private wrong. *Id.* at 418-19, 29 L.Ed.2d at 5. Here, the fact that plaintiffs have shown a demonstrable threat of a private wrong (private nuisance, *see* Part IV.B. *supra*) shows that defendants' reliance on *Keefe* is misplaced.

> . . . [W]e must tread gingerly in the area of prior restraints (*Nebraska Press Association v. Stuart,* 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.E.2d 683 (1976)):
>
> > The thread running through all these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.
>
> But this is not at all the classic prior restraint case. It does not involve an injunction against publication of the communication of ideas: an anti-Semitic newspaper (*Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed.2d 1357 (1931)) or government documents (*New York Times v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)) or public record information about criminal trials (*Nebraska Press Association* [*supra*]).
>
> What this case rather involves is prevention of a private wrong: invasion of [plaintiffs'] privacy. As to that, *Near,* 283 U.S. at 709, 51 S.Ct. at 628, [75

> L.Ed. at 1364,] *Nebraska Press Association,* 427 U.S. at 557-58, 96 S.Ct. at 2801-02[, 49 L.Ed.2d at 696-97] and *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 418, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1[, 5] (1971) all suggest an injunction to prevent private wrongs stands on a very different footing from injunctions that suppress the communication of information as such.

Huskey v. National Broadcasting Co., Inc., 632 F.Supp. 1282, 1294, (N.D.Ill. 1986) (footnote omitted). *See Bering v. SHARE,* 106 Wash.2d 212, 235-37, 721 P.2d 918, 932-33, *cert. dismissed,* 479 U.S. 1050, 93 L.Ed.2d 990 (1987); *Trojan Elec. & Mach. Co. v. Heusinger,* 162 A.D.2d 859, 860, 557 N.Y.S.2d 756, 758 (App. Div. 1990); *see also Austin Congress Corp. v. Mannina,* 46 Ill.App.2d 192, 196 N.E.2d 33 (1964). Accordingly, we reject defendants' prior restraint argument.

2. *State Constitutional Argument*

Since defendants' contention regarding the constitutionality of the injunction under Article I, Section 14 of the North Carolina Constitution was not made before the trial court, this contention may not be raised for the first time on appeal. *Johnson v. Highway Commission,* 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963) ("It is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below"); *Plemmer v. Matthewson,* 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972); *Bland v. City of Wilmington,* 278 N.C. 657, 660, 180 S.E.2d 813, 816 (1971); *Lane v. Insurance Co.,* 258 N.C. 318, 322, 128 S.E.2d 398, 400 (1962); *Pinnix v. Toomey,* 242 N.C. 358, 367, 87 S.E.2d 893, 901 (1955).

3. *The Scope of the Trial Court's Ban*

Next, defendants argue that

> [a] municipality may ban "focused picketing taking place solely in front of a particular residence," *Frisby*, 487 U.S. at 483. But Greensboro already has a *Frisby*-type antipicketing ordinance, and the Winfields have obeyed this ordinance. The superior court's ban on all marching and picketing along more than an entire street went far beyond both the Greensboro ordinance and *Frisby*.

Given this argument, a brief discussion of pertinent additional information is necessary. As noted *supra*, the City of Greensboro passed an ordinance pertaining to residential picketing pursuant to G.S. 160A-174, the statute which delegates and limits the general ordinance-making powers of cities and towns:

> (a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizen and the peace and dignity of the city, and may define and abate nuisances.
>
> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> (1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;
>
> (2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State of federal law;
>
> (3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

> (4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;
>
> (6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.
>
> The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

Pursuant to this statute, section 26-157(b) of the Greensboro Code of Ordinances was enacted on 19 November 1990 and provides as follows: *"Individual Residence Picketing Prohibited.* Provided, in order to promote residential privacy and tranquility, it shall be unlawful for any person to picket solely in front of, before or about the residence or dwelling of any individual." *Compare Frisby*, 487 U.S. at 477, 101 L.Ed.2d at 426-27 (where the Town Board of Brookfield, Wisconsin enacted "the following flat ban on all residential picketing: 'It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.'"). *Compare Boffard v. Barnes*, 248 N.J. Super. 501, 503, 591 A.2d. 699, 700 (Ch. Div. 1991) (granting the issuance of a preliminary injunction even in the absence of a public ordinance; granting doctor's action for a preliminary injunction "based upon common law tort: deprivation of the use and enjoyment of property, and mental and emotional pain and anguish"); *Murray v. Lawson*, 264 N.J. Super. 17, 31, 624 A.2d 3, 11 (App. Div. 1993), *petition for cert. granted,*

—— A.2d —— (No. C-932, 36,720, May 27, 1993) (affirming permanent injunction and rejecting "the notion that courts are powerless to protect residential privacy simply because there is no local ordinance regulating focused or targeted residential picketing"). The record contains affidavits from a Greensboro Police Department detective, the Greensboro Police Department attorney, and the City attorney stating that defendants have not violated the department's or the city's interpretation of the ordinance.

Defendants' conclusion that they have acted within the permissible bounds of an ordinance, deduced summarily from the observation that they have not been cited for a violation nor arrested, does not preclude a trial court's issuance of a preliminary injunction where plaintiffs have demonstrated the likelihood of a tort by defendants under state law. G.S. 160A-174(b) specifically provides that "An ordinance is not consistent with State or federal law when: . . . . (3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law." The necessary implication of G.S. 160A-174(b)(3) is that the General Assembly intended to allow the issuance of a preliminary injunction upon a showing by plaintiffs of a likelihood of success on the merits of a tort claim and some type of irreparable harm, *A.E.P. Industries,* 308 N.C. at 401, 302 S.E.2d at 759-60, *Wrightsville Winds Homeowners' Assn.*, 100 N.C. App. at 535, 397 S.E.2d at 346, even where an ordinance has not been enforced by local authorities or where an ordinance might permit one to pursue a course of action that otherwise would constitute a potential tort claim under state law. *Cf. Greene v. City of Winston-Salem,* 287 N.C. 66, 213 S.E.2d 231 (1975); *State v. Williams,* 283 N.C. 550, 196 S.E.2d 756 (1973). Accordingly, this argument is overruled.

Additionally, defendants argue that the trial court's ban "on all marching and picketing along more than an entire street went far beyond . . . *Frisby.*" Specifically, the injunction enjoined and restrained defendants "from picketing, parading, marching, or demonstrating anywhere within 300 feet of the centerline of Waycross Drive, including any parts of any other street that fall within 300 feet of the center line of Waycross Drive." Plaintiffs' residence is located at 500 Waycross Drive. Dr. Kaplan does not maintain a medical office or treat patients at his residence. *See Frisby,* 487 U.S. at 488, 101 L.Ed.2d at 434. Waycross Drive is a non-thoroughfare residential street on which plaintiffs' home lies approximately at the midpoint and has no sidewalks. Waycross Drive begins from the south at a cul-de-sac just to the south of Staunton Drive, runs approximately two and one-half city blocks (going across Staunton Drive, Calverton Drive, Kenbridge Drive, and Monmouth Drive), and dead ends to the north at a golf course just north of Monmouth Drive. Plaintiffs' residence is located on Waycross Drive near the Calverton Drive cul-de-sac and is located approximately midway of the block between Staunton Drive (to the south) and Kenbridge Drive (to the north). The total area governed by the injunction is a protected zone encompassing 300 feet of each side of the center line of Waycross Drive, which as noted *supra* runs approximately two and one-half city blocks long.

This limited protected zone clearly does not offend defendants' First Amendment rights. *Compare Frisby,* 487 U.S. 474, 101 L.Ed.2d 420 (1988) (ruling on constitutionality of an *ordinance* of general applicability, prohibiting anyone, not just named defendants, from " 'picketing before or about the residence or dwelling of any individual' "); *see Northeast Women's Center, Inc. v. McMonagle,* 939 F.2d 57, 67 (3rd Cir. 1991) ("Of course, we are dealing with a remedial injunction and not an ordinance of general application. Hence, *Frisby* may not strictly apply to the instant injunction"). Decisions from other jurisdiction have upheld injunctions enjoining similar activities within similarly expansive boundaries.

Klebanoff v. McMonagle, 380 Pa. Super. 545, 546, 552 A.2d 677, 677, *appeal denied*, 522 Pa. 620, 563 A.2d 888 (affirming injunction permanently barring defendants "from picketing or demonstrating in the street directly in front of the home" of a doctor; where the trial court's final decree provided that defendants "are hereby enjoined and restrained from demonstrating, picketing or patrolling on Rogers Road, and any intersection with Rogers Road from Chelton Mills Drive to Serpentine Lane"); *Northeast Women's Center, Inc.*, 939 F.2d at 67 & n.14, 71 (3rd Cir. 1991) (upon remanding for further findings regarding trial court's chosen distances for permanent injunction, specifically noting that "[i]t may even be appropriate for the district court to retain the 2500 foot restriction if unusual or extraordinary circumstances are found" and in the interim establishing boundary prohibiting "congregating, picketing, patrolling, or demonstrating within five hundred (500) feet of the residence of any of plaintiff's employees, staff, owners or agents, or using bullhorns or other sound amplification equipment within twenty-five hundred (2500) feet of the residence of any of plaintiff's employees, staff, owners or agents"); *Dayton Women's Health Ctr. v. Enix*, 68 Ohio App.3d 579, 585-86, 588, 589 N.E.2d 121, 125, 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women's Health Center, Inc.*, —— U.S. ——, 120 L.Ed.2d 903 (1992) (affirming order prohibiting " '[p]icketing in any form including parking, parading, or demonstrating which is *limited* to the homes of patients, employees, staff or volunteers of the Dayton Women's Health Center of the physicians performing services at the Dayton Women's Health Center.' (Emphasis added)."). Given the significant interest in protecting the use and enjoyment of one's own home, *Frisby*, 487 U.S. at 484, 101 L.Ed.2d at 431, this injunction does no more than address the exact source of the 'evil' it seeks to remedy. *Id.* at 485, 101 L.Ed.2d at 432. Accordingly, we conclude that this protected zone

meets the constitutionally mandated requirement that the injunctive relief be narrowly tailored.

C. *Ample Alternative Channels of Communication*

We conclude that in all respects "the order is content-neutral and sufficiently narrow to protect the interests of those who are presumptively unwilling to receive this form of speech and have the right not to, while leaving open ample alternative channels of communication." *Dayton Women's Health Ctr. v. Enix*, 68 Ohio App.3d at 588, 589 N.E.2d at 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women's Health Center, Inc.*, —— U.S. ——, 120 L.Ed.2d 903 (1992). We note that plaintiffs' lawsuit does not seek to limit or preclude defendants' right to continue their demonstrations at Dr. Kaplan's business premises, which are "generally a more effective forum to disseminate their views, unless the picketers' objective is only to harass or intimidate an individual." *Town of Barrington v. Blake*, 568 A.2d 1015, 1021 (R.I. 1990); *Boffard*, 248 N.J. Super. at 506, 591 A.2d at 701. The record further discloses that plaintiffs do not seek to limit or preclude defendants' right to continue other activities such as leafletting. *See Martin v. Struthers*, 319 U.S. 141, 145-49, 87 L.Ed. 1313, 1318-20 (1943). The order leaves open ample alternative places and channels of communication, including *inter alia* Dr. Kaplan's private medical office, the Women's Pavilion in Greensboro, demonstrations at other public sites, door-to-door solicitations, the distribution of literature, telephone calls, and direct mailings. In sum, here defendants "have many outlets for their expressive activity, while the privacy and home life which is rightfully due [plaintiffs] can only be realized in one place, their home." *Klebanoff*, 380 Pa. Super. at 555, 552 A.2d at 682, *appeal denied*, 522 Pa. 620, 563 A.2d 888.

D. *Portion of the Order Enjoining the Prolife Action League*

In their first assignment of error, defendants contend that the trial court "erred by enjoining Prolife Action League of Greensboro when there is no finding of its separate legal identity or existence." We disagree.

Defendants' argument that Prolife Action League is not an entity subject to an injunction is meritless if not frivolous. First, defendants offer no authority for this argument in their brief. Although the Prolife Action League is not organized in a corporate or partnership form, evidence in the record indicates that it distributes literature, has its own mailing address, engages in correspondence, produces a monthly newsletter notifying interested persons of upcoming pro-life events such as meetings, pickets, and speeches, and organizes demonstrations. In her own affidavit, defendant Linda B. Winfield refers to herself as a director of the Prolife Action League. This assignment of error fails. *N.Y. State Nat. Organization for Women v. Terry,* 886 F.2d 1339, 1352 (2nd Cir. 1989), *cert. denied,* 495 U.S. 947, 109 L.Ed.2d 532 (1990); *Pro-Choice Network v. Project Rescue,* 799 F. Supp. 1417, 1423 (W.D.N.Y. 1992).

E. *Portion of Order Enjoining Defendants' Threatening Conduct*

In their fourth, sixth, ninth, and eleventh assignments of error, defendants contend that the trial court "erred by enjoining the Winfields from engaging in threatening conduct when there is no finding that the Winfields have engaged in any such conduct."

First, we address defendants' contention that the record is devoid of evidence of "threatening conduct" by defendants. The record shows that defendant Ronald W. Benfield (who has not personally appeared in this action) was convicted of a violation of G.S. 14-277.1 for threatening

Dr. Kaplan on 8 August 1991 as follows: "You are mine. You killed my baby and I'm going to kill you. Don't fear God, fear me." The record further shows that defendants Mr. and Mrs. Winfield counselled Mr. Benfield on at least one occasion before the death threat was made and on at least two occasions after the death threat was made. The record further discloses that defendants' other actions could be reasonably perceived as threatening as well. Affidavits in the record support the trial court's finding. Sue P. Meschan, who lives in the house on Waycross Drive next to plaintiffs, stated in her affidavit that

> The demonstrations have been annoying, distressing, and intimidating to me and my family. From my interactions with them, I believe that the Kaplans also have found the demonstrations emotionally distressing and intimidating.
>
> . . . .
>
> The presence of these picketers has impaired my family's use and enjoyment of our property. When the picketers happen to be in front of our house, it makes it difficult to get in and out of our driveway, and it makes my family less likely to be in our front yard when the demonstrations are occurring. . . .
>
> The signs carried by the picketers often include gruesome pictures, which scare my children. . . .

Joan H. Osborne, who lives at the intersection of Waycross Drive and Kenbridge Drive, stated in her affidavit that defendants

> carry signs making reference to the fact that Dr. Kaplan "kills babies," and naming Dr. Kaplan. . . . More recently, the signs carried by these picketers have been even more brutal than they were initially. They also seem to refer to Dr. Kaplan by name more frequently.
>
> . . . .

> The presence of the picketers has impaired our use of our property. It is difficult and disconcerting to try to drive through them when leaving or returning to our home. Also, I do not like to go out into my yard and do yard work when they are present. My sons normally enjoy playing football outdoors, but do not like to do so when these people are present.
>
> I am aware through my interactions with the Kaplans that these picketers have caused the Kaplans a great deal of mental anguish.

A colleague of plaintiff Mrs. Kaplan stated that the affiant "share[d] Meg's [plaintiff's] feelings of anxiety and fear as a result of these tactics." The three affidavits from the staff members of the Women's Pavilion also support the trial court's finding that defendants have engaged in "threatening conduct." Since we find sufficient evidence to support the trial court's finding, it is conclusive on appeal.

However, we note that Paragraphs C and D of the preliminary injunction provide as follows:

> WHEREFORE, based on these findings, THE COURT ENJOINS AND RESTRAINS the defendants, their officers, agents, servants, and employees, and all persons in active concert or participation with them who receive actual notice of this order:
>
> . . . .
>
> C. from threatening or communicating threats to any of the plaintiffs, at their home or elsewhere; and
>
> D. from personally confronting any of the plaintiffs in a threatening manner, at their home or elsewhere.

Though it is our view that these aspects of the preliminary injunction are content-neutral, we are concerned that paragraphs C and D of the preliminary injunction

be correctly construed. Accordingly, we adopt the following cautionary admonition set forth by another court with similar concerns:

> "Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul*, —— U.S. ——, ——, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305, 317 (1992). The . . . order . . . should not be construed to regulate the content of the demonstrator's message in any respect. As Justice Scalia said in the recent St. Paul hate-crime ordinance and cross-burning case: "[N]on verbal expressive activity can be banned because of the action it entails, but not because of the idea it expresses. . . ." —— U.S. at ——, 112 S.Ct. at 2544, 120 L.Ed.2d at 319. The "power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element. . . ." *Id.* In sum, the intellectual content of the message may not be the target of the injunction, *only the hostile method of its delivery*.
>
> The injunction entered here may not be construed as a content-based restriction on expression. It must be construed as focusing specifically and exclusively on the *location and manner of expression*.

Horizon Health Center v. Felicissimo, 263 N.J. Super. 200, 223-24, 622 A.2d 891, 903 (App. Div. 1993) (emphasis added).

VIII. *Conclusion*

For the reasons stated, we hold that the relief afforded in the trial court's preliminary injunction is constitutional in all respects. Except as modified with respect to plaintiffs' claim for the intentional infliction of emotional distress, the order below in all respects is

Affirmed.

Judges WELLS and MARTIN concur.

APPENDIX B

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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92 CvS 3228

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Plaintiffs,

v.

PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFELD, JOHN DOES I through XXV, and JANE DOES I through XXV,

Defendants.

PRELIMINARY INJUNCTION

The Court has heard the plaintiffs' motion for a preliminary injunction under N.C. Gen. Stat. § 1-485 (1)-(2). In connection with this motion, it has reviewed the plaintiffs' verified complaint, the affidavits of Mark Anderson, M.D., Nancy Cable-Wells, Maurice A. Cawn, Susan Gillet, R.N., Kay Lynne Inman, R.N., Joan Marsh, Sue P. Meschan, Joan Osborne, R.W. Saul, Jesse L. Warren, Linda B. Winfield, and William H. Winfield, Jr., and the briefs presented by the plaintiffs and by defendants Linda B. Winfield, William H. Winfield, Jr., and the Prolife Action League of Greensboro. The Court has heard this motion after giving notice to all parties, and has given all parties an opportunity to present arguments. Defendant Ronald W. Benfield failed to appear for the hearing on this motion, despite being properly served with the verified complaint and an order giving notice of the hearing. After considering the evidence, briefs, and arguments presented by the parties, the Court hereby grants the plaintiffs' motion for a preliminary injunction.

Pursuant to Rule 65(d) of the North Carolina Rules of Civil Procedure, the Court makes the following findings:

1. Dr. Richard Kaplan, one of the plaintiffs, is an obstetrician and gynecologist, who as one aspect of his medical practice performs abortions. Under North Carolina law and federal law, abortions are lawful medical procedures. *See, e.g.*, N.C. Gen. Stat. § 14-45.1 (1986).

2. The defendants have carried out activities designed to coerce Dr. Kaplan to stop performing abortions.

3. The defendants' activities have included at least twelve instances of targeted picketing at the home of Dr. Kaplan and his family. On these occasions, groups including defendants Linda Winfield, Bill Winfield, and other defendants have walked up and down the Kaplans' street, Waycross Drive, carrying signs that name Dr. Kaplan. Although these moving pickets go beyond the frontage of the Kaplans' house, they remain largely in sight of the Kaplans' house. The circumstances make clear that the defendants are targeting the Kaplans and are harming the Kaplans by manifesting a physical presence just outside their house. These circumstances include, among other things, statements by defendant William Winfield that he and the Prolife Action League of Greensboro will stop coming to the Kaplans' neighborhood only when Dr. Kaplan stops performing abortions.

4. Defendant Ronald Benfield has made a direct threat on Dr. Kaplan's life. In addition, the other defendants have engaged in conduct toward the Kaplans that the Kaplans have reasonably interpreted as threatening.

5. The Kaplans are likely to prevail on the merits of this case under their claims for intentional infliction of emotional distress and private nuisance.

6. The Kaplans will suffer irreparable harm unless the Court enjoins the defendants from carrying out targeted residential picketing against them and from threatening them.

7. The defendants have picketed against Dr. Kaplan's performance of abortions not only at the Kaplans' house, but at several other locations as well. These locations include the edge of the Kaplans' neighborhood, Dr. Kaplan's private medical office, and the Women's Pavilion in Greensboro. The defendants' own actions show that they have many alternative forums and means of communicating their concerns, other than picketing in the Kaplans' immediate neighborhood.

8. Since the defendants have ample alternative means of communicating their views, the First Amendment allows the Court to enter a narrowly tailored, content-neutral injunction to protect the Kaplans' residential peace, privacy, and security. Under the analysis stated by the U.S. Supreme Court in *Frisby v. Schultz*, 487 U.S. 478 (1988), the Court may enter an injunction to uphold these important interests by prohibiting targeted residential picketing, even if that targeted picketing goes beyond just one house. The Court specifically relies on the reasoning in several post-*Frisby* decisions that recognize that the First Amendment allows such an injunction. *See Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 65-68, 71 (3d Cir. 1991); *Boffard v. Barnes*, 591 A.2d 699, 702 (N.J. Super. Ct. Ch. Div. 1991); *Klebanoff v. McMonagle*, 552 A.2d 677, 678, 682 (Pa. Super. Ct. 1988), *appeal denied*, 563 A.2d 888 (Pa. 1989); *Valenzuela v. Aquino*, 800 S.W.2d 301, 304-06 (Tex. Ct. App. 1990), *petition for review granted* (Tex. May 1, 1991).

9. Given the defendants' repeated actions against Dr. Kaplan and his family over the last year, the Court finds that it should grant equitable relief to protect the Kaplans from targeted picketing and other threatening conduct, while at the same time tailoring that relief to protect the defendants' exercise of their First Amendment rights. The defendants' conduct in the Kaplans' neighborhood, and the physical characteristics of that neighborhood, indicate that without an injunction prohibiting picketing and similar activities on the Kaplans' street and within 300 feet of that street, the interest in upholding residential peace, privacy, and security would go unserved. An injunction of this sort will be narrowly tailored to serve the interest in protecting residential peace, privacy, and security.

10. An injunction to stop targeted residential picketing in the Kaplans' neighborhood is based not on the content of any would-be picketers' speech, but on the effects caused by the picketers' physical presence.

WHEREFORE, based on these findings, THE COURT ENJOINS AND RESTRAINS the defendants, their officers, agents, servants, and employees, and all persons in active concert or participation with them who receive actual notice of this order:

A. from picketing, parading, marching, or demonstrating anywhere on Waycross Drive in Greensboro, North Carolina;

B. from picketing, parading, marching, or demonstrating anywhere within 300 feet of the center line of Waycross Drive, including any parts of any other street that fall within 300 feet of the center line of Waycross Drive;

C. from threatening or communicating threats to any of the plaintiffs, at their home or elsewhere; and

D. from personally confronting any of the plaintiffs in a threatening manner, at their home or elsewhere.

The Court orders copies of this order to be served on the identified defendants in this action, and on the other defendants as soon as they are identified. A person will have actual notice of this order when he or she has personally received a true copy of it.

This injunction will take effect as soon as the plaintiffs jointly post a $2000 cash or secured bond, pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure. Unless earlier modified by consent or by the Court, this injunction will remain in effect until this matter is resolved by a final judgment.

This injunction was entered in open court, 10 February 1992, at 1:55 p.m.

As evidenced by the attached bond filing, the plaintiffs posted the required bond on 10 February 1992, at 4:53 p.m.

The undersigned Judge Presiding retains jurisdiction of this matter for purposes of any further proceedings in this case; including any matters pertaining to this Preliminary Injunction Order.

This written order is entered this 20th day of February, 1992, at 11:00 a.m.

/s/ Hon. Thomas W. Ross
HON. THOMAS W. ROSS
Superior Court Judge Presiding

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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92 CVS 3228

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Plaintiffs,

v.

PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, JOHN DOES I through XXV, and JANE DOES I through XXV,

Defendants.

TEMPORARY RESTRAINING ORDER

This matter has been heard by the undersigned Judge of Superior Court on the plaintiffs' verified complaint and on their motion for a temporary restraining order under N.C.R. Civ. P. 65(b) to preserve the status quo until a hearing on the plaintiffs' motion for a preliminary injunction can be held.

Based on the verified complaint and the arguments of counsel, it appears to the Court that:

1. The plaintiffs are residents of 500 Waycross Drive in Greensboro, North Carolina. Plaintiff Richard Kaplan

(Dr. Kaplan) is an obstetrician and gynecologist who is licensed to practice medicine in North Carolina. As part of his medical practice, Dr. Kaplan from time to time performs abortions.

2. The defendants oppose abortion and have been carrying out actions meant to cause Dr. Kaplan to stop performing abortions. These actions have included:

—threats to Dr. Kaplan's and his family's safety,

—intimidating mailings to Dr. Kaplan at his home and office,

—demonstrations at Dr. Kaplan's office on 13 February 1991, 25 March 1991, 10 July 1991, and 13 December 1991,

—demonstrations at and around the Kaplans' home on 15 January 1991, 17 April 1991, 14 June 1991, 21 June 1991, 9 August 1991, 23 August 1991, 20 September 1991, 25 October 1991, 18 November 1991, 19 November 1991, 20 November 1991, and 11 January 1992.

3. Unless restrained from further actions against the Kaplans, the defendants are likely to continue these actions.

4. The defendants' actions are causing the Kaplans immediate and irreparable harm in at least the following forms:

—invasion of the Kaplans' domestic privacy,

—diminution of the Kaplans' use and enjoyment of their home and destruction of their sense of security there, and

—severe emotional distress, including fear, intimidation, and humiliation.

These injuries are irreparable because they are different to measure in money and because they stem from recurring acts to which the Kaplans should not be required to submit.

5. Preserving the status quo pending a hearing on the merits, and preventing further irreparable harm to the Kaplans, requires that this order be issued without notice.

THE COURT THEREFORE ORDERS:

1. The plaintiffs' motion for a temporary restraining order under N.C.R. Civ. P 65(b) is granted.

2. Pending a preliminary injunction hearing, which the Court sets for January 24, 1992, at 3:00 p.m., defendants Prolife Action League of Greensboro, Linda Winfield, Bill Winfield, and Ronald Benfield, as well as their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with the defendants who receive actual notice of this order in any form, ARE ENJOINED (a) from picketing, parading, marching, or demonstrating at or around the Kaplans' home in any manner tending to draw attention to the Kaplans or their home; and (b) from threatening, abusing, harassing, or intimidating the Kaplans, at their home or elsewhere.

3. The defendants will be considered to have actual notice of this order when they have been served with copies of this order.

4. Any law enforcement officer with jurisdiction over the events described in this order is directed to serve copies of this order on the defendants as soon as possible. All parties to this case are ordered to appear for the preliminary injunction hearing scheduled above.

5. As a condition of this order, the plaintiffs collectively shall post $250.00 security for the payment of any damage that the defendants might sustain if the defendants have been wrongfully enjoined by this order.

ENTERED this 14 day of January, 1992 at 10:50 AM.

/s/ Hon. Thomas W. Ross
Judge of Superior Court

Security having been paid in the amount of $250.00, this order has been issued on 14th January, 1992, at 11:00 A.M.

/s/ [Illegible]

APPENDIX D

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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92 CVS 3228

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN and MARGUERITE KAPLAN as Guardian Ad Litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Plaintiffs,

v.

PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, JOHN DOES I through XXV, and JANE DOES I through XXV,

Defendants.

ORDER OF APPOINTMENT
AS GUARDIAN AD LITEM

This matter has been heard before the undersigned Clerk of Superior Court of Guilford County, North Carolina, on the petition for the appointment of a guardian ad litem for Jacob M. Kaplan and David S. Kaplan. It appears to the Court that Jacob M. Kaplan and David S. Kaplan are minors, and are without general or testamentary guardians within this state; that these minors have a need for the appointment of a guardian ad litem to bring an action to safeguard their rights and to rep-

resent them in this action; and that the petitioner, Marguerite Kaplan, is the minors' mother and is a suitable, qualified, and proper person to serve as guardian ad litem for her minor sons.

NOW, THEREFORE, IT IS ORDERED that Marguerite Kaplan be and hereby is APPOINTED as guardian ad litem for Jacob M. Kaplan and David S. Kaplan, for purposes of this action.

This 14 day of January, 1992.

/s/ Marie W. Daughtrey
Asst. Clerk
of Superior Court of
Guilford County

APPENDIX E

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

---

92 CvS 3228

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Plaintiffs,

v.

PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, JOHN DOES I through XXV, and JANE DOES I through XXV,

Defendants.

CONSENT ORDER

This matter is before the Court on the plaintiffs' and the defendants' joint request that the hearing on the plaintiffs' motion for a preliminary injunction be rescheduled, and that the temporary restraining order (TRO) entered on 14 January 1992 be extended. It appears to the Court that rescheduling the injunction hearing will allow a more complete presentation of issues at that hearing, and that extending the TRO will facilitate the rescheduling and continue the status quo until the motion for a preliminary injunction is decided. It also appears to the

Court that rule 65(b) of the North Carolina Rules of Civil Procedure allows this extension and rescheduling.

The Court therefore orders as follows:

1. The hearing on the plaintiffs' motion for a preliminary injunction is rescheduled to 11:00 a.m. on Monday, 10 February 1992, or as soon thereafter as that motion can be heard.

2. The TRO entered in this case on 14 January is extended through the time when the Court decides the plaintiffs' motion for a preliminary injunction.

This 24 day of January, 1992, at 4:10 p.m.

/s/ Hon. Thomas W. Ross
Judge of Superior Court

CONSENTED TO:

For the plaintiffs:

/s/ Alan W. Duncan
ALAN W. DUNCAN
SMITH HELMS MULLISS & MOORE
P.O. Box 21927
Greensboro, NC 27420
(Attorney for Richard D. Kaplan, Marguerite Kaplan, and Marguerite Kaplan as guardian ad litem for Jacob M. Kaplan and David S. Kaplan)

For the defendants:

/s/ Arthur J. Donaldson
ARTHUR J. DONALDSON
DONALDSON & HORSLEY, P.A.
208 W. Wendover Ave.
Greensboro, NC 27401
(Attorney for Prolife Action League of Greensboro, William H. Winfield, Jr., and Linda Winfield; also authorized to indicate consent of Ronald W. Benfield)

APPENDIX F

SUPREME COURT OF NORTH CAROLINA
EIGHTEENTH DISTRICT

No. 350P93

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Plaintiffs,

v.

PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, JOHN DOES I through XXV, and JANE DOES I through XXV

From Guilford
(9218SC459)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendants in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Plaintiffs; and upon consideration of the petition for discretionary review of the decision of the North Carolina Court of Appeals, filed by Defendants pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 7th day of October 1993.

s/ Parker, J.
For the Court"

The Petition for Discretionary Review is:

"Denied by order of the Court in conference, this the 7th day of October 1993.

s/ Parker, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 1993.

CHRISTIE SPEIR CAMERON
Clerk of Supreme Court

/s/ Peggy N. Byrd
Assistant Clerk

APPENDIX G
Guilford County Tax Map
Sheet No. 583
59a

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MONMOUTH COURT

MONMOUTH DRIVE

CITY OF GREENSBORO
DEDICATED FOR FLOOD PLAIN & OPEN SPACE

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7.80 AC.

DRIVE

WAYCROSS DRIVE

KENBRIDGE CT.

KENBRIDGE DRIVE

COURT

STAUNTON DRIVE

WESTGATE DRIVE

CALVERTON DRIVE

STARMOUNT FOREST
MAP 1, SECTION 7, PB 64-103
MAP 2, SECTION 7, PB 64-104
MAP 3, SECTION 7, PB 69-78

No. 93-1159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LINDA WINFIELD, WILLIAM H. WINFIELD, JR., and LINDA WINFIELD d/b/a the PROLIFE ACTION LEAGUE OF GREENSBORO,

Petitioners,

v.

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, and MARGUERITE KAPLAN as guardian ad litem for JACOB M. KAPLAN and DAVID S. KAPLAN,

Respondents.

On Petition for Writ of Certiorari to the North Carolina Court of Appeals

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RESPONDENTS' BRIEF IN OPPOSITION

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Attorneys for Respondents

QUESTIONS PRESENTED

After a group appeared twelve times at a doctor's home, and after a person associated with that group threatened the doctor's life, a state trial court entered a preliminary injunction barring the group from similar picketing and threats pending trial on the merits. This temporary injunction bars the group from picketing and similar activities on or within 300 feet of the doctor's street, but does not affect the group's leafletting or other expressive conduct. On an interlocutory appeal, the state court of appeals affirmed. The state supreme court dismissed a further appeal for lack of a substantial constitutional question and denied discretionary review.

1. Does a petition for certiorari filed 103 days after entry of the relevant order fall within this Court's jurisdiction?

2. Is a state supreme court's order declining to review an affirmance of an interlocutory injunction a "final judgment[ ] or decree[ ]" under 28 U.S.C. § 1257(a) (1988)?

3. Is an injunction granted to prevent a thirteenth repetition of targeted picketing by the same group a prior restraint?

4. Is an injunction that makes no reference to the expressive content of any activity, and is justified by the physical effects of the enjoined activity, content-based?

5. Does the injunction described above violate the federal constitutional right to free speech?

PARTIES

The respondents dispute the petitioners' characterization of the Prolife Action League of Greensboro (the League) in the caption of the petition. The respondents have sued the League as an entity that is separate from Linda Winfield. *See infra* p. 2 n.2.

After the filing of the petition, the respondents identified the following people, who had previously been sued as "Doe" defendants:

Scott Allred
Leigh Allred
Stephen Michael Beall
Karen L. Beane
Virginia Bell
Sharon Steele Clark
Mariana Donadio
Ruth Douglas
Libby Dunsmore
Rhonda Edmonds, a/k/a Rhoda Edmonds
Theresa Farley
Pamela Ford
Yvonne Ford
D. Craig Fox
Hariette Gabriele
Georgia Gaines
Elsie Galan
Karin Grubbe
Deborah Hebestreit
Seth Hinshaw
Albert Hodges
Betty White Kellenberger
Richard Kellenberger
Jeffrey Alexander Kendall
Father Conrad Kimbrough
B.A. Kuhl, a/k/a Bud Kuhl

Carol Kuhl
Kathy Lanham
Joseph Lanham
Dr. Eileen Lopp
Dianne McClamroch
Julian McClamroch
Bernard McHale
Elaine McHale
Rebecca Morrison
Ginny O'Hara
Monica Pollard
Duane Richardson
Marta Richardson
Candido Rosario, a/k/a Candido Rosario Matos
Elizabeth D. Salter, a/k/a Betty Salter
Kimberly Schimmel
Dr. Keith Schimmel
Jane Sechler
Annabelle Simpson
Betty Steinkamp
Ronald Steinkamp
Lynn Thompson
John Thompson
Laurel Treddinick, and
Amber Winfield.

None of these former "Doe" defendants is a party to this interlocutory appeal.

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TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

JURISDICTION

The North Carolina Court of Appeals announced its decision on 20 July 1993. The North Carolina Supreme Court entered its order dismissing the petitioners' appeal and denying discretionary review[1] on 7 October 1993. The petition was filed 103 days later, on 18 January 1994.

The petition was filed out of time. *See* 28 U.S.C. § 2101(c) (1988). In addition, this case does not involve a "final judgment[ ] or decree[ ]" by the North Carolina courts. 28 U.S.C. § 1257(a). For both of these reasons, this Court lacks jurisdiction. *See infra* pp. 6-10.

STATUTES INVOLVED

The respondents disagree that this Court should reach the merits of the petition under the First and Fourteenth Amendments. *See* Pet. at 2; *infra* pp. 6-11. The text of 28 U.S.C. §§ 2101(c) and 1257(a) appears in the appendix to this brief.

STATEMENT OF THE CASE

Facts

Richard Kaplan is an obstetrician and gynecologist who practices primarily in Greensboro, North Carolina. Dr. Kaplan, his wife Marguerite, and their two sons live in a quiet residential neighborhood in Greensboro. Dr. Kaplan provides abortions as one part of his practice.

In November 1990, the Kaplans became aware that Dr. Robert Wein, a colleague of Dr. Kaplan, had been accosted at his home by a group of picketers. The picketers had vowed to

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[1]For brevity, the rest of this brief will refer to this order as the order dismissing the petitioners' appeal.

continue appearing at the Weins' home until Dr. Wein stopped providing abortions. Dr. Wein had quickly complied with the picketers' demands.

On 15 January 1991, a group of fifteen to twenty people, apparently associated with the Prolife Action League of Greensboro (the League),[2] picketed on the street outside the Kaplans' house. The League's members walked back and forth on the Kaplans' short street, but the Kaplans' house was their unmistakable target. They targeted the Kaplans' house by centering their route on it and by carrying signs that named Dr. Kaplan. *Compare* Pet. at 4 (asserting that the League simply "walked through the Kaplan[s'] neighborhood") *with* Pet. App. at 45a (finding that "[a]lthough these moving pickets go beyond the frontage of the Kaplans' house, they remain largely in sight of the Kaplans' house").

In the year before the Kaplans filed this lawsuit, the League came back to the Kaplans' house and repeated this picketing at least eleven times. The League's repeated appearances frightened and intimidated the Kaplans, virtually imprisoning them in their house. Facing this abuse in their own home, and knowing that it could recur at any time, caused lasting distress for the Kaplan family. In addition, the League often used small children in its picket lines; as a result, the Kaplans and their neighbors had to drive in fear of hitting one of these children by

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[2]The Kaplans have sued all of the activists who have harassed them, but as of the time of the preliminary injunction, they had identified only William and Linda Winfield, Ronald Benfield, and the League by name. Only the Winfields and the League have appealed the preliminary injunction. Since the unidentified defendants, as well as the Winfields, have carried out the picketing in question, this brief will use "the League" to refer to any relevant group that includes these people. *Compare* Pet. at 5 (asserting that the League is a mere title or banner for Linda Winfield) *with Kaplan v. Prolife Action League*, 111 N.C. App. 1, 36, 431 S.E.2d 828, 847, Pet. App. at 1a, 40a (rejecting League's argument that it is not an organization), *appeal dismissed and disc. rev. denied*, 335 N.C. 175, 436 S.E.2d 379 (1993).

accident. The picketing disconcerted the Kaplans' neighbors, making them stay indoors to avoid a confrontation.

The League compounded the effect of its picketing by dropping off gruesome leaflets in the Kaplans' and other neighborhoods. It also picketed at Dr. Kaplan's medical office and at an abortion clinic where he sometimes works, disseminated private facts about the Kaplans, and made false public statements about Dr. Kaplan.

Near the beginning of the League's campaign, William Winfield accosted Dr. Kaplan and asked what he had to do to make Dr. Kaplan stop providing abortions. This statement showed that Winfield intended to achieve his goal by any means necessary.

Defendant Ronald Benfield has made less subtle threats. On 8 August 1991, about midway through the League's picketing campaign, Benfield came to the clinic where Dr. Kaplan sometimes works. After talking with the Winfields, Mr. Benfield approached Dr. Kaplan and said: "You're mine. You killed my baby. I'm going to kill you. Don't fear God, fear me." This statement led Mr. Benfield to be convicted of communicating a threat. In light of all the other ways the League has harassed the Kaplans, as well as Benfield's evident connection with the League, *see* L. Winfield Aff. ¶¶ 27-30 (admitting that the Winfields have met three times with Benfield, including two meetings after 8 August 1991), Benfield's threats magnified the Kaplans' fear for their safety and made them feel constantly tense, even at home.

The League's harassment campaign reached a peak in mid-November 1991, when the League appeared at the Kaplans' home for three straight days. On the third day, at the Kaplans' request, counsel spoke with the picketers, asking them simply to leave the Kaplans alone at their home, and informing them that if they picketed the Kaplans' home again, the Kaplans would be forced to pursue legal remedies. William Winfield

replied that the picketing would continue until Dr. Kaplan stopped providing abortions.

On 21 November 1991, the day after being asked to leave, the League's members picketed at the public entrance to the Kaplans' neighborhood, rather than the Kaplans' home itself. On 11 January 1992, however, the League returned to the Kaplans' home, once again destroying the Kaplans' privacy and sense of security.

On 14 January 1992, the Kaplans filed this action for injunctive relief and damages. They sought a preliminary injunction limited to the League's residential picketing and in-person threats. The superior court granted a preliminary injunction, restraining only these acts pending trial. The injunction does not cover any other expressive conduct of the League, such as its residential leafletting. In this interlocutory appeal, the League seeks to have this injunction vacated, and, presumably, to resume its picketing campaign at the Kaplans' home.

Proceedings

The Kaplans do not contest the League's statement of the proceedings below, except for the League's summary of the reasoning of the court of appeals. *See* Pet. at 6-7. That summary is inaccurate in three respects.

First, the League errs by asserting that the court of appeals "identified no basis -- other than the peaceful residential marching itself -- for holding petitioners' marching to be a nuisance." *Id.* at 6. In fact, after considering the entire record, the court agreed that the League had interfered with the Kaplans' use and enjoyment of their property in a substantial, nontrespassory way. *See Kaplan v. Prolife Action League*, 111 N.C. App. 1, 11, 21-23, 431 S.E.2d 828, 832, 838-39, Pet. App. at 1a, 7a, 20a-22a, *appeal dismissed and disc. rev. denied*, 335 N.C. 175, 436 S.E.2d 379 (1993). It specifically noted the "substantial disruption of plaintiffs' residential privacy

due to defendants' actions." *Id.* at 25, 431 S.E.2d at 840, Pet. App. at 25a. In the end, the court found ample evidence to support the trial court's overall conclusion that the Kaplans would likely prevail on their private nuisance claim. *Id.* at 24, 431 S.E.2d at 840, Pet. App. at 24a.

Second, when the court decided that the League's residential picketing was targeted at the Kaplans, it noted the coercive *purpose* of the picketing, but it did not rely on the picketing's *message* or other expressive content. *See id.* at 25-26, 431 S.E.2d at 841, Pet. App. at 26a (analysis of targeting); Pet. at 6 (League's argument); *see also Kaplan*, 111 N.C. App. at 29, 431 S.E.2d at 843, Pet. App. at 30a ("We conclude that the trial court did not focus on the effect or impact of defendants' message on potential listeners, but rather on defendants' physical presence having a deliberate intimidating effect on plaintiffs while at their home."); *infra* p. 21 (showing how *Frisby v. Schultz*, 487 U.S. 474 (1988), refutes the League's argument that the court could not rely on the purpose of the picketing).

Finally, the League superimposes its arguments on the reasoning of the court of appeals when it asserts that the court "applied the time, place, and manner test *for statutes, ordinances, and regulations.*" Pet. at 6 (emphasis added). The League argued below that the time, place, and manner test is limited to these types of measures, but the court of appeals did not accept that argument. *See Kaplan*, 111 N.C. App. at 27-28, 431 S.E.2d at 842, Pet. App. at 28a-29a; *see also infra* pp. 17-18 (noting that this argument lacks support in this Court's decisions).

REASONS FOR DENYING THE WRIT

The League's petition has two fatal jurisdictional defects. First, the petition was filed out of time, 103 days after the North Carolina Supreme Court entered its order dismissing the League's appeal. Second, the order at issue does not qualify for review under 28 U.S.C. § 1257(a) (1988), because it is interlocutory, not final.

Even aside from these jurisdictional problems (and their prudential implications), there is no reason for the Court to review the state courts' interlocutory orders in this case. Contrary to the League's assertions, there is no conflict among the lower courts on the federal constitutional principles applied below. In situations like the one faced by the Kaplans, the lower courts have consistently granted and upheld injunctive relief against residential picketing. In addition, the courts in this case have faithfully followed this Court's decisions under the First Amendment, including *Frisby v. Schultz*, 487 U.S. 474 (1988).

I. THE PETITION IS UNTIMELY.

The Court lacks jurisdiction to grant the petition, which was filed out of time. Section 2101(c) of title 28 requires that a petition for certiorari be filed within ninety days after the entry of the relevant judgment or decree. 28 U.S.C. § 2101(c); *accord* Sup. Ct. R. 13.1 (requiring petitioners to file petitions within ninety days after entry of orders denying discretionary review). In *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990), the Court held that this ninety-day time limit is mandatory and jurisdictional.

Although the North Carolina Supreme Court entered its order dismissing the appeal on 7 October 1993, the League waited until 18 January 1994 to file its petition. The League thus missed the ninety-day deadline for the petition by almost two weeks.

The text of the state supreme court's order makes clear that the order was entered on 7 October 1993. The order states: "The following order *was entered* and *is hereby certified* to the North Carolina Court of Appeals." Pet. App. at 57a (emphasis added). The order goes on to state that the appeal was dismissed and the petition for discretionary review was denied on 7 October 1993. *Id.* at 57a-58a. The only other date on the order comes at the very bottom, where the clerk of court states, "Witness my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 1993." *Id.* at 58a. The verb tenses in the italicized portion of the order above make clear that the order was entered by the court on one date (7 October 1993) and certified by the clerk on another (18 October 1993).

Confirming this plain meaning, both the official *North Carolina Reports* and West's *Southeastern Reports* show the sole date of the order as 7 October 1993. *See Kaplan v. Prolife Action League*, 335 N.C. 175, 436 S.E.2d 379 (1993). Since the petition for certiorari was filed more than ninety days after the order was entered, the Supreme Court should deny the petition for lack of jurisdiction. *Cf. Jenkins*, 495 U.S. at 45 (noting that the Court dismisses untimely petitions).

II. THE SUPREME COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257(a) BECAUSE THE NORTH CAROLINA SUPREME COURT'S ORDER IS NOT A FINAL JUDGMENT.

Under 28 U.S.C. § 1257(a), the Supreme Court can review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This finality requirement in section 1257(a) is jurisdictional. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605, 611 (1989). A petitioner has the burden of establishing the Supreme Court's jurisdiction, and any doubts should be resolved against jurisdiction. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948).

The North Carolina Supreme Court's dismissal of the appeal from the preliminary injunction lacks finality for two reasons. First, that court's order is interlocutory, and does not fall within any of the special categories recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-86 (1975). Second, the state supreme court's order is not final for all the parties involved in this case. *See, e.g., Collins v. Miller*, 252 U.S. 364, 370 (1920); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892).

A. *The North Carolina Supreme Court's Order Is Not Final.*

Neither a dismissal of an appeal from a preliminary injunction nor a related denial of discretionary review is a final judgment or decree under 28 U.S.C. § 1257(a). An order lacks finality, after all, unless it is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). More recently, this Court has reiterated that "the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *accord Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987).

In this case, the court of appeals expressly recognized the lack of finality of the preliminary injunction proceedings. It stated that a preliminary injunction's "impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory." *Kaplan*, 111 N.C. App. at 14, 431 S.E.2d at 834, Pet. App. at 11a (quoting *A.E.P. Indus. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (in turn quoting

earlier decision)). When the state supreme court dismissed the League's interlocutory appeal from such an injunction, that court's order was a merely interlocutory or intermediate step in this litigation, not a final determination of it. *Market Street Railway*, 324 U.S. at 551.

In *Cox Broadcasting*, 420 U.S. at 477-86, this Court identified four categories of cases in which a state court's decision regarding federal issues can be treated as final, even though additional proceedings in the state court are expected.[3] The dismissal of the appeal from the preliminary injunction does not fit within any of these categories. *See id.* Since the supreme court's order is an interlocutory order that falls outside these categories, this Court lacks jurisdiction. *See Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981); *Flynt*, 451 U.S. at 623.

B. *The North Carolina Supreme Court's Order Is Final for Fewer Than All the Parties Involved in This Case.*

The North Carolina Supreme Court's order is not a final judgment under section 1257(a) for a second, independent reason: even if it were final for the League entity and the Winfields, it would still be final for fewer than all the individual defendants in this lawsuit. *See Collins*, 252 U.S. at 370; *Meagher*, 145 U.S. at 611; *see also Minnick*, 452 U.S. at 126-27 (holding that state court judgment lacked finality, in part because additional plaintiffs might have presented claims and new evidence on remand). Not all of the "Doe" defendants in this case have been identified. Others have been so recently named that they have not yet answered the complaint, or even

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[3] Although *Cox Broadcasting* involved a nondiscretionary appeal, the Court has used the *Cox Broadcasting* categories to decide whether it has certiorari jurisdiction. *See, e.g., Asarco*, 490 U.S. at 612; *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120-27 (1981); *Flynt*, 451 U.S. at 620-23.

received service of process. In fact, only two of the fifty-three people who were defendants on the date of the preliminary injunction have pursued this interlocutory appeal.

In *Meagher*, 145 U.S. at 608, this Court faced a similar situation. The Court noted that the appellants were "only a portion of the defendants who were proceeded against" and held that "[t]he case should have been determined as to all, before our interposition, if justifiable in any view, could be invoked." *Id.* at 611. Here, likewise, the North Carolina courts have not decided even the most preliminary issues regarding many of the individual defendants. For these defendants at least, the North Carolina Supreme Court's order cannot be final. On this basis alone, the Court lacks jurisdiction to grant certiorari.

C. *Even If the Court Deems the North Carolina Supreme Court's Order Final for Jurisdictional Purposes, It Should Deny the Petition in Its Discretion.*

Jurisdictional concerns aside, a state court's interlocutory order makes a poor candidate for discretionary review. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947) (declining to hear an interlocutory appeal from the highest court of California, despite jurisdiction to do so). Even under the statute governing certiorari to federal courts, which does not expressly require final judgments as section 1257(a) does, the Court generally refuses to review interlocutory orders, absent extraordinary circumstances. *See, e.g.*, 28 U.S.C. § 1254(1); *Virginia Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostok R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

This policy of requiring finality applies to state court decisions with even greater force. *See Radio Station WOW*, 326 U.S. at 124. When a state court decision is challenged, the finality requirement not only promotes judicial economy and

expedites final decisions, but also recognizes that the state courts have concurrent jurisdiction with the federal courts on federal issues. This Court recently stated that when it considers reviewing state court decisions, it keeps federalism in mind and gives proper consideration to "the judgment of other repositories of constitutional power concerning the scope of their authority." *Minnick*, 452 U.S. at 122 n.30 (quoting *Rescue Army*, 331 U.S. at 571).

Denying the petition would have the vital additional benefit of allowing the North Carolina courts to develop the record fully before this Court decides any federal issues presented. *See Cox Broadcasting*, 420 U.S. at 478 n.7 (noting that the inconvenience and costs of piecemeal appellate review are among the key considerations that govern finality). As stated earlier, this petition comes before some of the defendants have even been identified. At a trial on the merits, those defendants will have an opportunity to present evidence that might change the course of the litigation, or at least change the facts underlying some of the federal issues. *See infra* pp. 13-14 (noting that the League's claims regarding the scope of injunctive relief turn on case-specific facts).

This disadvantage of interlocutory review is especially acute here, given the provisional nature of the fact findings supporting the preliminary injunction. The trial court granted the preliminary injunction before any discovery, relying mostly on affidavits filed by the Kaplans and the League. *See* Pet. App. at 44a-45a. Before a permanent injunction could issue, much more evidence would become part of the state court record. When all this evidence is in, the Court will be in a far better position to decide any federal issues presented by this case.

III. THE DECISION OF THE COURT OF APPEALS ACCORDS WITH OTHER LOWER COURTS' DECISIONS ON RESIDENTIAL PICKETING; THE CONFLICTS ALLEGED BY THE LEAGUE ARE ILLUSORY.

Even if one looks past the jurisdictional and prudential problems with the petition, the petition still should fail, because it raises no legal issues worthy of this Court's review. The lower-court conflicts portrayed in the petition, for example, cannot withstand analysis. The lower courts have unanimously accepted the principle that injunctions against focused residential picketing comport with the First Amendment. The minor variations among the lower-court cases reflect differences in factual records, not conflicts in legal reasoning.

A. *Like the* Valenzuela *Court, the Courts Below Required That Injunctive Relief Be Based on a Valid Cause of Action.*

The League's assertion that "the decision below treats residential demonstrations as *per se* unlawful and enjoinable" is false. Pet. at 9. The North Carolina courts demanded, as a prerequisite to the preliminary injunction, that the Kaplans show themselves likely to prove a tort or another cause of action. *See* Pet. App. at 46a (finding the Kaplans likely to prevail on the merits of their claims for private nuisance and intentional infliction of emotional distress); *Kaplan*, 111 N.C. App. at 16-25, 431 S.E.2d at 835-41, Pet. App. at 13a-25a (analyzing both these preliminary findings in detail; accepting only the finding on private nuisance).

Valenzuela v. Aquino, 853 S.W.2d 512, 513-14 (Tex. 1993), which the League cites as conflicting, actually reflects the same approach. Reviewing a permanent injunction, the Texas Supreme Court searched the record for evidence of a civil wrong under Texas law. *See id.* at 513 (noting that the Aquinos had prevailed only on negligent infliction of emotional

distress, and that the Texas Supreme Court had disapproved this tort after the *Valenzuela* trial). The court found no such evidence,[4] but it still remanded to allow the Aquinos to assert new tort claims. *See id.* at 514. By doing so, it confirmed that an injunction against residential picketing could be upheld if supported by a cause of action. Thus, the only relevant difference between *Valenzuela* and this case is that the Kaplans have shown the tortious conduct that the *Valenzuela* court found missing under Texas law.

B. *There Is No Conflict in the Cases Involving Injunctions Against Residential Picketing.*

Contrary to the League's argument that the scope of the preliminary injunction conflicts with certain decisions, *see* Pet. at 10-11, there is no legal conflict in the cases involving injunctions against residential picketing. In determining whether the geographical scopes of residential picketing injunctions comply with the Constitution, the courts have consistently applied the same legal standards. They have upheld injunctions of varying geographical scopes, but they have done so in response to *facts* that have varied from case to case. *See, e.g., Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 67 (3d Cir. 1991) (stating that additional facts might justify a residential picketing injunction with a radius as great as 2500 feet); *Welsh v. Johnson*, 508 N.W.2d 212, 216 (Minn. Ct. App. 1993) (holding that a two-block restriction was constitutional in light of the facts).

Like the courts in these and many other cases, cited by the League elsewhere in its petition (*see* Pet. at 7 n.1), the courts below allowed injunctive relief that was narrowly tailored to the harm shown in this case. *See Kaplan*, 111 N.C. App. at 34-35,

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[4]The Texas court made its observation that residential picketing is "not unlawful per se" as it rejected a second tort theory of the Aquinos, invasion of privacy. *See Valenzuela*, 853 S.W.2d at 513-14.

431 S.E.2d at 846-47, Pet. App. at 36a-39a; Pet. App. at 47a (¶ 9). The following are some of the facts relevant to the scope of the present injunction:

- The League picketed at the Kaplans' home as often as once a day.
- The League's picket line contained as many as twenty-five people, making one or more picketers constantly visible from the Kaplans' home.
- The picketing involved people who had carried out a year-long campaign of harassment against the Kaplans, and who were in league with a person who had directly threatened Dr. Kaplan's life.
- The Kaplans live on a short, dead-end street in a quiet residential neighborhood. *See, e.g.*, Pet. App. at 59a.
- The League has innumerable alternatives to picketing at the Kaplans' house, including leafletting or soliciting on the Kaplans' street, picketing in other parts of the Kaplans' neighborhood, picketing at Dr. Kaplan's medical office, and picketing at abortion clinics.

The scope of the injunction cannot be analyzed without detailed review of these and other facts. *See Kaplan*, 111 N.C. App. at 34, 431 S.E.2d at 846, Pet. App. at 37a (analyzing additional facts on this issue).

This Court does not ordinarily grant certiorari to weigh case-specific facts such as these. *See, e.g., Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *United States v. Johnson*, 268 U.S. 220, 227 (1925). On the present petition, the Court should hesitate doubly before agreeing to sift facts, since the present record relates only to interlocutory relief. That record will be far better developed after a trial on the merits.

To create an apparent conflict in the cases on residential picketing, the League relies on decisions that construe anti-residential-picketing *ordinances*. *See* Pet. at 10-11. Those

cases are not comparable to this one. Anti-picketing ordinances are construed narrowly because, unlike injunctions, they operate in advance of any demonstrated harm, and they prohibit *anyone* from picketing in front of *any* individual's residence. *See, e.g., Town of Barrington v. Blake*, 568 A.2d 1015, 1021 (R.I. 1990).

C. *This Case Is Distinguishable from* Cheffer.

The conclusion that the present injunction is content-neutral does not conflict with the conclusion in *Cheffer v. McGregor*, 6 F.3d 705, 710 (11th Cir. 1993), that a different injunction was "viewpoint-based."

Cheffer turns on an issue absent from this case: how the persons bound by an injunction have been identified. *See id.* at 710-11. The plaintiff in *Cheffer* alleges that Florida courts and police are applying an injunction to anti-abortion protesters exclusively and indiscriminately, on the view that all anti-abortion protesters must be acting in concert. *See id.* at 707. In the passage quoted by the League and in other places, the *Cheffer* decision focuses on viewpoint-specific *application* of this injunction. *See id.* at 707, 708, 710, 711 & n.6; *see also Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972) (discriminatory use of a neutral regulation to punish people "for merely expressing unpopular views" violates First Amendment).[5]

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[5]A case related to *Cheffer* involves similar allegations. In *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664 (Fla. 1993), *cert. denied*, 62 U.S.L.W. 3491 (U.S. Jan. 24, 1994) (No. 93-833), *cert. granted sub nom. Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 907 (1994) (No. 93-880), the petitioners apparently contend that the trial court has enjoined them through a similar viewpoint-based technique. *See* Petition for Writ of Certiorari at 3, *Madsen*, No. 93-880 (U.S. Dec. 3, 1993) ("Petitioners . . . were not associated with those protesters blocking the clinics or with Operation Rescue.").

In contrast, neither *Cheffer* nor any other case accepts the League's argument here, that an injunction with content-neutral terms is content-based simply because it applies to named defendants. *See* Pet. at 12-13. This proposition does conflict with the decision below, but it has been soundly rejected by this Court and by the lower courts. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Northeast Women's Center,* 939 F.2d at 63 ("It is true that this injunction applies only to McMonagle and his codefendants, but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation."). If the persons affected by the present injunction turn out to be "pro-life demonstrators and no one else," Pet. at 12, it will be because only "pro-life demonstrators" have invaded the Kaplans' privacy. The League has identified no court willing to condemn this sensible outcome.

IV. THE DECISION BELOW FOLLOWS THIS COURT'S FIRST AMENDMENT TEACHINGS.

Throughout this case, and again in its petition, the League has argued that this Court's First Amendment decisions categorically protect the League's campaign to break the Kaplans. These arguments misread the decisions of this Court and misstate the facts of this case.

A. *The Court of Appeals Faithfully Applied This Court's Teachings on Prior Restraints.*

The League argues that the court of appeals erred by not automatically applying prior restraint analysis to the preliminary injunction. *See id.* at 13. Contrary to the League's argument, not all injunctions that relate to expressive conduct are prior restraints.

As the court of appeals correctly noted, an injunction to remedy a private wrong, such as tortious picketing, is not a prior restraint. *See, e.g., Organization for a Better Austin v. Keefe,* 402 U.S 415, 418-19 (1971); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 709 (1931); *Kaplan,* 111 N.C. App. at 30-31, 431 S.E.2d at 844, Pet. App. at 32a-33a. This Court and the lower courts have consistently upheld injunctions against tortious picketing without condemning those injunctions as prior restraints. *See, e.g., American Radio Ass'n v. Mobile S.S. Ass'n,* 419 U.S. 215, 229-30 (1974); *Hughes v. Superior Court,* 339 U.S. 460, 467-69 (1950); *Bering v. SHARE,* 106 Wash. 2d 212, 235-37, 721 P.2d 918, 932-33 (1986), *cert. dismissed,* 479 U.S. 1050 (1987).

Two of the Supreme Court cases cited by the League, in fact, show that an injunction to regulate specific, tortious, expressive conduct stands on a different footing from injunctions that suppress speech generally. *See* Pet. at 13-14. In *Keefe,* this Court condemned an injunction because it operated "not to redress alleged private wrongs, but to suppress . . . distribution of literature 'of any kind' in a city of 18,000." *Keefe,* 402 U.S. at 418-19 (quoting injunction).[6] Likewise, in *Carroll v. President & Commissioners,* 393 U.S. 175 (1968), the injunction did not redress a private wrong, but was a government's naked attempt to suppress a public rally anywhere within a county. *See id.* at 177 n.3.

The present injunction, in contrast, has not cut off the League's expression before its occurrence. Instead, it has regulated the place and manner of the League's expressive

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[6] In *Keefe,* this Court did not consider whether injunctions against residential picketing are prior restraints. *See Keefe,* 402 U.S. at 417 (noting that the record lacked any evidence of residential picketing). Rather, the Court condemned an injunction against leafletting, which the Court later expressly distinguished from residential picketing as a "more generally directed means of communication." *Frisby v. Schultz,* 487 U.S. 474, 486 (1988); *see Keefe,* 402 U.S. at 417-20.

conduct, redressing torts already experienced by the Kaplans twelve times. The injunction is thus more analogous to a subsequent punishment than to a prior restraint. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (noting that commission's order was based on a continuing course of repetitive conduct by defendants, and stating that the Court "has never held that all injunctions are impermissible"); *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 294-95 (1941) ("Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.").

In sum, the courts below did not stray from established First Amendment doctrine by applying time, place, and manner analysis to this injunction. *See, e.g., Hirsh v. City of Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (expressing approval of injunctions that impose time, place, and manner regulations based on protesters' prior conduct). This Court has not prohibited courts from using time, place, and manner analysis to review a content-neutral injunction like this one. The League has failed to point out any conflict between the appeals court's analysis and this Court's teachings regarding prior restraints.

B. *The Preliminary Relief Granted Below Is Consistent with* Frisby v. Schultz.

In comparing the present injunction with this Court's authoritative decision on residential picketing, the League has inaccurately portrayed both of the items being compared. *See* Pet. at 15 (discussing *Frisby v. Schultz*, 487 U.S. 474 (1988)).

First, the injunction at issue creates nothing like a "speech-free zone." *Id.* Even on the Kaplans' short street, the injunction does not bar the League from proselytizing door-to-door, distributing or mailing handbills, or contacting residents by

phone. *See Kaplan*, 111 N.C. App. at 36, 431 S.E.2d at 847, Pet. App. at 39a; *see also Frisby*, 487 U.S. at 484 (stating that these alternatives, plus one other, justified a citywide ban on residential picketing). The League can also picket in other parts of the Kaplans' neighborhood, as it did at least once before this lawsuit began. *See, e.g.*, Pet. App. at 46a (¶ 7); *see also Frisby*, 487 U.S. at 484 (noting final alternative channel: "Protesters have not been *barred from the residential neighborhoods*. They may *enter such neighborhoods*, alone or in groups, even marching . . . .") (emphasis added). Thus, even if one accepts the League's view that the Kaplans' neighborhood is the only expressive venue worth discussing, the injunction is not silencing the League. *See* Pet. at 15; *see also Kaplan*, 111 N.C. App. at 36, 431 S.E.2d at 847, Pet. App. at 39a (noting the many other outlets available for the League's expression, including medical facilities).

Second, the League's argument that *Frisby v. Schultz* bars any regulation of picketing that extends beyond the frontage of one house, Pet. at 15, has no support in that Supreme Court decision or any other. In *Frisby*, the Court held it constitutional to ban targeted residential picketing in the interest of residential privacy, and it defined targeted picketing by its intended and actual effects on its targets. *See Frisby*, 487 U.S. at 486-87.

The *Frisby* Court did assume that the challenged ordinance banned "only focused picketing taking place solely in front of a particular residence." *Id.* at 483. This factual assumption does not mean, however, that no picketing that goes beyond one house can be targeted picketing. The Court's legal reasoning, indeed, disproves this assertion. The Court emphasized "[t]he devastating effect of targeted picketing," not just one-house picketing, "on the quiet enjoyment of the home." *Id.* at 486.

The present case illustrates how picketers can move beyond the frontage of one house, yet still target a family in its home and cause the "unique and subtle impact" condemned in *Frisby*. *Id.* at 487. Appearing as often as daily, the League's members

walked back and forth in front of the Kaplans' home in groups as large as twenty-five, carrying signs that named Dr. Kaplan as the object of their picketing. In no meaningful sense was this picketing "transient." Pet. at 15. Indeed, when the League obliquely complains that the injunction keeps it away from "a given residence," *id.*, it admits that its picketing is "narrowly directed at [that] household, not the public," *Frisby*, 487 U.S. at 486.

In sum, the *Frisby* Court's reasoning applies a fortiori to the remedial injunction in this case. In *Frisby*, the devastating effects of residential picketing justified a citywide ban on that picketing. Here, these same effects amply justify a ban that focuses on one short street. *See* Pet. App. at 47a-48a, 59a. The *Frisby* Court asked whether the ordinance "protect[ed] only unwilling recipients of the [picketers'] communications." 487 U.S. at 485. In this case, this requirement is readily satisfied, because only these unwilling recipients are seeking injunctive relief.

C. *The Record Refutes the League's Assertion That the Injunction Is Content-based.*

Finally, the League argues that the injunction fails two of this Court's tests for content-neutrality. The record contradicts both of these arguments.

First, the League has no basis for asserting that the injunction "singles out only those bearing a particular message." Pet. at 15. The injunction does not use the messages of any enjoined activities to identify those activities. It applies to all picketing, threats, and similar actions within its scope, stating no exceptions. *See* Pet. App. at 44a-48a; *see also supra* p. 16 (showing that the fact that the injunction applies to named defendants does not make it content-based).

The League's second argument, that the injunction was entered "precisely because of the impact of the petitioners' *message of protest* upon the respondents," is equally baseless.

Pet. at 17. Both courts below made express findings that refute this argument. Pet. App. at 47a ("An injunction to stop targeted residential picketing in the Kaplans' neighborhood is based not on the content of any would-be picketers' speech, but on the effects caused by the picketers' physical presence."); *accord Kaplan*, 111 N.C. App. at 29, 431 S.E.2d at 843, Pet. App. at 30a-31a. Nor did the courts use content-based reasoning when they decided that the League's picketing was targeted at the Kaplans. *See id.* at 25-26, 431 S.E.2d at 841, Pet. App. at 26a; Pet. at 17. In *Frisby*, the Court cited similar evidence of targeting, *see* 487 U.S. at 486-87, but turned aside claims that the related regulation was content-based, *see id.* at 482.[7]

The injunction rests not on the League's message, but on the coercive, physical way the League has repeatedly delivered that message. *See Kaplan*, 111 N.C. App. at 29, 431 S.E.2d at 843, Pet. App. at 30a-31a; Pet. App. at 45a, 47a; *see also Frisby*, 487 U.S. at 487 (characterizing the ordinance in that case as a "'regulation[ ] of form and context,'" rather than a "regulation of communications due to the ideas expressed") (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 84 (1983) (Stevens, J., concurring in the judgment)).

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[7]The passages that the League has extracted from *Boos v. Barry*, 485 U.S. 312 (1988), played no role in the later *Frisby* decision. They have no role to play here. *See Frisby*, 487 U.S. at 481-82; Pet. at 16-17.

CONCLUSION

The Kaplans respectfully request that the Court deny the petition.

Respectfully submitted,

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22 February 1994

APPENDIX

Subsection (c) of 28 U.S.C. § 2101 provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Subsection (a) of 28 U.S.C. § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treatises or statues of, or any commission held or authority exercised under, the United States.

No. 93-1159

In The Supreme Court of the United States

October Term, 1993

Linda Winfield, *et al.*,
Petitioners,

v.

Richard D. Kaplan, M.D., *et al.*
Respondents.

On Petition for Writ of Certiorari to the North Carolina Court of Appeals

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. INTRODUCTION

The preliminary injunction in this case represents the most extreme injunctive restriction on peaceful residential demonstrations upheld by any court to date. Pet. at 7 & n.1; *id.* at 11.

"Petitioners' march[ing], if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (and cases cited). Yet the injunction in this case forbids, throughout the pendency of this litigation, all "picketing, parading, marching, or demonstrating" anywhere on an entire street, plus 300 feet in any direction from that street. Pet. App. 47a.

This Court has already granted review, in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880), of an injunction which forbids, *inter alia*, "approaching, congregating, picketing, patrolling [and] demonstrating . . . within three-hundred (300) feet of the residence" of various persons, *see* Pet. for Cert., *Madsen v. Women's Health Center, Inc.* (No. 93-880), at B-9. The geographical scope of the present anti-speech injunction considerably exceeds that of the residential restriction in the *Madsen* injunction. Accordingly, this Court should grant the present petition outright or, in the alternative, hold this petition pending decision of the *Madsen* case and then either grant plenary review or dispose of this petition summarily by granting review, vacating the decision below, and remanding this case for further proceedings in light of *Madsen*.

II. FACTS

As they have done throughout this litigation, the respondents (Kaplans) continue to distort the relevant facts. Several points bear special mention.

The residential marching of petitioners (Winfields) and their companions was at all times completely peaceful. There is simply no evidence of any trespass, excessive noise, or disorderly conduct on the part of the marchers. Respondent Richard Kaplan, as an abortionist, may feel subjective dismay at the pro-life marchers' anti-abortion *message*. But to characterize the quiet, sign-carrying procession of individuals ranging from small children to elderly women as "frighten[ing] and intimidat[ing]," Br. in Opp. at 2, is ludicrous.

Furthermore, at no time did the pro-life marchers confine themselves to the front of the Kaplan residence (or any other residence); rather, they walked along the length of the street.[1] The trial court so found, Pet. App. 45a, and there is no evidence to the contrary.

The Kaplans' claim of an "evident connection" between Ronald Benfield (a *pro se* defendant in this case) and the Winfields, Br. in Opp. at 3, is simply false. The undisputed evidence shows that Benfield has never taken part in any residential marches or other pro-life activities. On the contrary, Benfield's wife sought an abortion from respondent Kaplan. Benfield, distraught over the abortion of his child, allegedly directly threatened Kaplan's life and was convicted for this threat. Benfield's only encounters with the Winfields were scattered conversations wholly unconnected with the marching at issue here.

III. PROCEEDINGS

The Kaplans mischaracterize the proceedings below. Br. in Opp. at 4-5.

First, neither the trial court nor the court of appeals identified any misconduct associated with the residential marching in this case; rather, these courts held the

[1] The Kaplans call Waycross Drive a "short street," Br. in Opp. at 2, and a "short, dead-end street," *id.* at 14. On the contrary, Waycross extends some 2000 feet in length and intersects three other streets (one in the middle of and one close to each end of Waycross). Pet. App. 59a (map).

marching itself to be objectionable and enjoinable. The Kaplans' cannot explain away this crucial legal point.

Second, contrary to the Kaplans, the court of appeals most certainly did "rely on the picketing's [sic] message or other expressive content," Br. in Opp. at 5 (emphasis omitted), when deciding that the marching constituted "targeted picketing." *See, e.g.*, 431 S.E.2d at 841 (Pet. App. at 26a):

> The record includes *inter alia* the following evidence showing [petitioners'] targeted picketing of [respondents] home: . . . evidence that signs used by the demonstrators specifically name Dr. Kaplan; literature disseminated by the Prolife Action League listing Dr. Kaplan as on of the "major abortionists from Greensboro that go to the clinics where we are praying". . . .

Third, the court of appeals reviewed the injunction at issue under the "time, place, and manner test" traditionally used to review statutes, ordinances, and regulations. *Id.* at 842 (Pet. App. 28a-29a). The Kaplans' assertion that this test also governs anti-speech injunctions, Br. in Opp. at 5, simply begs one of the central legal questions presented in this case.

IV. JURISDICTION

Respondents present two weak arguments against this Court's jurisdiction.

A. Timeliness

First, the Kaplans argue that the present petition is untimely.

The Supreme Court of North Carolina denied the Winfields' request for review in this case. That court first voted in conference, on October 7, 1993, and then officially announced its decision, on October 18, 1993. Pet. App. 58a. The Winfields filed their petition within 90 days of the date the state supreme court announced its

order denying review, i.e., October 18, 1993; hence, the petition is timely. Sup. Ct. R. 13.1.

The Kaplans argue that this Court should count the 90 days not from the date the state supreme court *announced* its decision, but instead from the earlier date the state supreme court met in conference and *voted*—in secret—to deny review. The absurdity and injustice of the Kaplans' contention is obvious. Until a court's order is entered on the official record and made public, it makes no sense whatsoever to start the deadline clock. This Court, for example, regularly votes in conference on a Friday but publicly announces its orders on the following Monday. In calculating briefing deadlines in this Court, would the Kaplans count from the date of the intial, secret vote to grant certiorari?

Under the Kaplans' view, a state supreme court (or a clerk) could sharply limit—or even eliminate—the time for seeking review in this Court simply by delaying public announcement of its ruling. The gap in the present case between in-conference voting and public announcement was eleven days (already a significant period in comparison with the 90-days allowed). A court in other cases might stretch the gap even wider, whether because of oversight or a backlog in processing orders, leaving would-be petitioners to fall into the void.

In short, the only fair and logical interpretation of the governing law, viz., 28 U.S.C. § 2101(c) and this Court's Rule 13.1, dictates that "entry of judgment"—the start of the 90-day clock—means the official, public announcement of an order, and not *in pectore* voting. *Accord Rubber Co. v. Goodyear*, 73 U.S. (6 Wall.) 153, 155-56 (1868) (denying motion to dismiss appeal as untimely; time to appeal triggered, not by earlier order settling the terms of the decision, but by subsequent "actual" entry, signing, or filing of decree, even where latter entry states "entered as of" the earlier order); *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22, 24-25 (1924) (denying motion to dismiss writ as untimely; event

fixing the time to seek review is not prior court decision but subsequent minute entry, despite respondents' argument "that the latter is a mere formal ministerial entry of a clerical character"); *cf. Scofield v. NLRB*, 394 U.S. 423, 427 (1969) (holding petition timely where filed within 90 days of date judgment entered "in fact" where petitioners "were given no notice of any entry of judgment" on earlier date of decision below).

B. Finality

The Kaplans also argue that this Court lacks jurisdiction to review a preliminary injunction because such an order is not "final" for purposes of review. This Court has long since rejected this argument. *See, e.g., Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 312 n.5 (1968) (injunction reviewable whether permanent or temporary); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.* (1971) (temporary injunction reviewable); *American Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n*, 419 U.S. 215, 217 n.1 (1974) (same).[2]

V. CONFLICTS WITH OTHER LOWER COURTS' DECISIONS

The decision below conflicts in several important respects with the decisions of other lower courts. Pet. § I. The Kaplans fail in their efforts to explain away these conflicts.

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[2] The Kaplans' other finality arguments are plainly inapposite. For example, the Kaplans operate under the mistaken premise that the Winfields seek review of the state supreme court's *order denying review*. Br. in Opp. at 8, 9. On the contrary, the Winfields seek review of the North Carolina Court of Appeals' *decision on the merits*. This decision upholds an injunction which binds the Winfields "and all persons in active concert or participation with them," Pet. App. 47a, and which, unless earlier modified, "will remain in effect until this matter is resolved by a final judgment," Pet. App. 48a. *See Logan Valley*, 391 U.S. at 312 nn.3 & 5 (holding similar order "clearly final for purposes of review by this Court").

A. *Per se* unlawfulness of residential marching

The court of appeals in this case held that residential marching, without more, was an enjoinable nuisance. The Supreme Court of Texas, in *Valenzuela v. Aquino,* 853 S.W.2d 512, 513-14 (Tex. 1993), held that residential picketing is not *per se* unlawful or enjoinable. A starker conflict is difficult to imagine.

The Kaplans argue that "the only relevant difference between *Valenzuela* and this case is that the Kaplans have shown that tortious conduct that the *Valenzuela* court found missing . . .," Br. in Opp. at 13. But this "only relevant difference" is precisely the point of legal conflict: whether residential picketing or marching, despite its presumptivly protected status under the First Amendment, *Frisby v. Schultz,* 487 U.S. 474, 479 (1988) (residential picketing "at the core of First Amendment"), may be deemed inherently tortious and enjoinable.

B. Extremity of restriction on residential marching

The Kaplans ignore, but do not deny, the fact that the geographical scope of the present injunction is more extreme than any restriction on residential picketing—whether by injunction or ordinance—upheld to date.

The Kaplans point to the frequency of the marching,[3] Br. in Opp. at 14, but this is irrelevant; the injunction absolutely bans marching and does not merely regulate the frequency of marches. The Kaplans point to the number of participants in the marching,[4] *id.*, but this is also irrelevant: the injunction does not limit the number of marchers.

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[3] The Winfields and others appeared with their signs, walking along the Kaplans' street, on an irregular basis averaging about once a month. Pet. at 4.

[4] The numbers were modest: one to two dozen at a time, Pet. at 3. *Compare Frisby v. Schultz,* 487 U.S. 474, 476 (1988) ("The size of the group varied from 11 to more than 40").

The Kaplans strain to make this a fact-intensive case, but in reality this case presents legal issues in sharp relief: the participants in the residential marching were at all times peaceful and orderly, and the injunctive ban is absolute. These factors make the present case highly suitable for review.

C. Content-discrimination

The injunction in this case binds pro-life demonstrators, and only pro-life demonstrators.[5] Such a restriction is plainly content-based, indeed viewpoint-based, as the Eleventh Circuit held in *Cheffer v. McGregor,* 6 F.3d 705 (11th Cir. 1993). Yet the court of appeals held that the present injunction is content-neutral. 431 S.E.2d at 842-43 (Pet. App. 29a-31a). Thus, the conflict between the court below and *Cheffer* is manifest.

The Kaplans deny any conflict over the "argument" that "an injunction with content-neutral terms is content-based simply because it applies to named defendants." Br. in Opp. at 16. This "argument," however, grossly mischaracterizes the position of the Winfields, who cite *Cheffer* for the common sense conclusion that an injunction which only restricts the *speech* activities of proponents of a particular *point of view* is not content-neutral.

VI. CONFLICT WITH SUPREME COURT'S DECISIONS

The decision below also conflicts squarely with the applicable decisions of this Court. Pet. § II. Again, the Kaplans fail to explain away these conflicts.

A. Prior restraint doctrine

The court of appeals disregarded this Court's long-standing distinction between prior restraints (injunctions, licensing schemes) and time, place, and manner regulations (statutes, ordinances, regulations). *See* Pet. § II(A).

The Kaplans cite *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), for their claim that the

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[5] The exception is *pro se* defendant Ronald Benfield, who never took part in any residential marches and who failed to appear and contest the injunction.

prior restraint doctrine does not apply to this case. In fact, *Keefe* compels the opposite conclusion.

Keefe, like the case at bar, was a civil suit between private parties. A resident, whose business practices certain protesters found offensive, sued to enjoin protest activities in his neighborhood. The resident alleged a private wrong—invasion of privacy, *id.* at 418—and the Illinois courts sustained an anti-speech injunction on that basis.

This Court reversed, holding the injunction to be an impermissible prior restraint. This Court held that the injunction "operates, not to *redress* alleged private wrongs, but to *suppress*," on the basis of previous expressive activities, future expressive activities. *Id.* at 418-19 (emphasis added). The key to *Keefe* was not the absence of an alleged private wrong—the *Keefe* plaintiff had alleged such a wrong—but the distinction between imposing *subsequent compensatory* liability (to "redress") and *previous* restraint (to "suppress"). This same distinction cuts in favor of the Winfields in this case: the preliminary injunction serves not to *redress* but to *suppress* allegedly tortious expressive activities.[6]

[6] The Kaplans' other purported authorities are inapposite.

The Kaplans cite cases involving picketing for an *unlawful* purpose. *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *Hughes v. Superior Court*, 339 U.S. 460 (1950). The present case involves demonstrations for *lawful* purposes, viz., protesting abortion, exposing Richard Kaplan's practice of abortion, appealing for support from Kaplan's neighbors and the general public, etc. *Cf. Keefe; Frisby.*

The Kaplans cite a case involving *commercial* speech advertising *illegal* business practices. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). This Court noted that the *Pittsburgh Press* order "is clear and sweeps no more broadly than is necessary," and "no interim relief was granted," and that contempt sanctions were unavailable. *Id.* at 390 & n.14. All of these factors distinguish *Pittsburg Press* from the present case.

Finally, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941), involved pervasive violence. The marching in this case has been completely peaceful.

B. Meaning of *Frisby v. Schultz*

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court recognized a limited exception (viz., for single-residence picketing) to the established constitutional protection for expressive activities in residential areas. Pet. § II(B). By contrast, the Kaplans—and the court below—interpret *Frisby* as unleashing a new rationale whereby *all* residential protests are subject to restriction "in the interest of residential privacy," Br. in Opp. at 19. Indeed, the Kaplans claim that *Frisby* "justified a *citywide* ban on [residential] picketing," Br. in Opp. at 19, 20 (emphasis added)—precisely the construction of the challenged ordinance which the *Frisby* Court rejected on constitutional grounds, 487 U.S. at 483.

A round-the-block march as in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), would plainly violate the injunction here. If *Frisby* in fact overruled *Gregory*—contrary to the *Frisby* opinion itself, 487 U.S. at 486—then this Court should say so. But if not, then this Court should grant review to remove the conflict between this Court's precedents and the decision below.

C. Content-discrimination

The injunction at issue is content-based for two reasons: it applies only to those espousing a pro-life point of view, and it is "justified" by the alleged adverse impact of the message upon the Kaplans. Pet. § II(C).

The Kaplans argue that the marchers' message is irrelevant, and that the physical aspects of the marching alone justify the ban on marching. Br. in Opp. at 20-21. This defies reality. First, the court below clearly tied its decision to the message and purpose of the marching. 431 S.E.2d at 841 (Pet. App. 26a). Second, the mere act of walking along a street carrying a sign cannot plausibly be regarded as tortious. If that were so, civil rights marches through segregated neighborhoods (or Nazi marches through Jewish neighborhoods) would be enjoinable. For that matter, *any* resident of Waycross Drive would have a cause of action for injunctive relief, since—

aside from the message—the Winfields' marching was indiscriminate in its impact.

The fact of the matter is that this case is in court because the Winfields' *message* bothered the Kaplans. To pretend otherwise is to put on blinders. By holding this injunction to be content-neutral, the court below rendered a decision which conflicts with this Court's decisions treating as content-based any restrictions justified by reference to the impact of the message. *E.g., Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2404 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation") (and cases cited).

CONCLUSION

This Court has currently pending before it a case involving the constitutionality of an injunction restricting, *inter alia*, residential demonstrations. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880). Accordingly, for the reasons set forth in the petition and reply in the present case, this Court should grant review in the case at bar or, in the alternative, hold this case pending *Madsen* and then either grant plenary review or summarily grant review, vacate the judgment below, and remand this case to the North Carolina Court of Appeals for further consideration in light of *Madsen*.

Respectfully submitted,

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March 14, 1994

SUPREME COURT OF THE UNITED STATES

LINDA WINFIELD ET AL. *v.* RICHARD D. KAPLAN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 93–1159. Decided June 30, 1994

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

In Greensboro, North Carolina, a state trial court entered a preliminary injunction prohibiting anti-abortion protestors from picketing, parading, marching or demonstrating anywhere on respondent's street or within 300 feet of the center line of that street. The North Carolina Court of Appeals affirmed and the Supreme Court of North Carolina denied discretionary review. The protesters petitioned this Court for review. When their petition first came before us for consideration, we voted to defer disposition pending the announcement of our judgment in *Madsen* v. *Women's Health Center, Inc.*, No. 93–880, because of the similarity of the issues presented in the two cases.

In Part III–E of the *Madsen* opinion, announced today, we find unconstitutional an injunctive provision—forbidding congregating, picketing, patrolling, and demonstrating within 300 feet of the residences of respondents' employees—indistinguishable in relevant respects from the one that remains in effect in the present case. The obviously appropriate course of action, therefore, is to grant the present petition for certiorari, vacate the judgment below, and remand the cause to the North Carolina Court of Appeals for reconsideration in light of *Madsen*. That is what we ordinarily do with

petitions that have been held for the decision of cases that, in the event, show the petitions to have merit.

Instead, the Court chooses to deny the petition for certiorari. The only conceivable explanation for this decision is that because the injunction presently under consideration is temporary, the North Carolina courts will have the benefit of our *Madsen* opinion when they come to decide whether a permanent injunction should issue. But if that fact alone justifies denial of the petition, we should have denied it at the outset, rather than held it pending *Madsen*.

No possible resolution of *Madsen* could have shown this case more flatly wrong than the opinion that issued. By holding the petition for *Madsen*, and then, in light of *Madsen*, letting the challenged injunction stand, we send a confusing message to the North Carolina courts. And also, of course, we leave a clear judicial abridgment of petitioners' First Amendment rights in effect. For these reasons, I dissent from the denial of certiorari.